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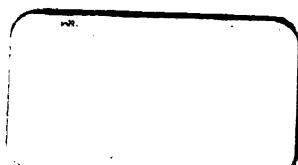
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Aug 1

66

# REPORTS

OF

## SELECT CASES

DECIDED IN



THE COURT OF APPEALS

OF KENTUCKY.

DURING THE YEAR 1833.

BY JAMES G. DANA.

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VOLUME I.

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Hawley  
KFK  
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A2  
v. 31

FRANKFORT, K.

PRINTED FOR THE REPORTER,

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1834.

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**JUDGES**  
OF  
**THE COURT OF APPEALS,**

WHEN THE FOLLOWING CASES WERE DECIDED.

The Hon. GEORGE ROBERTSON, *Chief Justice of Kentucky.*

The Hon. JOSEPH R. UNDERWOOD, }  
The Hon. SAMUEL S. NICHOLAS, } *Judges.*

 The cases reported in this volume, were selected by the Judges, under an Act of Assembly which directs that they shall permit the publication (under State patronage) of such cases only, as, in their opinion, "establish some new, or settle some doubtful point, or be otherwise by them deemed important to be reported."

# DECISIONS

OF

## THE COURT OF APPEALS

### OF KENTUCKY

AT THE

SPRING TERM....1833.

---

**Hanly and Shrieve *against* Blackford.**

CHANCERY.

[Mr. Hewitt for Appellants : Mr. Owsley for Appellee.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 2.

In the year 1800, Benjamin Blackford bought from William Conner, *ten acres of land*, described in the bond, of that date, for a title, "as *adjoining him* (Blackford) *on the north*," without any other designation of boundary or locality. But, ten acres were "laid off" to him, bounded on the north by the land on which he lived, and on the west by the road from Nicholasville to Lexington; and of the whole of which he retained the possession and exclusive use from 1800 to sometime in 1828, when John H. Hanly enclosed a part of it, which he claims under a deed from William Shrieve to him, for twenty eight acres and three quarters, which had been conveyed to Shrieve, in 1814, by Fisher Rice, William Conner and the sheriff of Jessamine, in consequence of a sale under a *feri facias* against Rico and Conner, which had been levied on the land as the property of Conner.

Contest for ten acres of land—titles and claims of the parties, respectively.

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Spring Term  
1833.

*Hanly &c.*

vs.

*Blackford.*

Blackford, having paid for the ten acres which he bought from Conner, filed a bill in Chancery against Hanly, Shrieve, Conner and Jefferson Rice (from whom, as devisee of Fisher Rice, he had obtained a conveyance, in 1821,) praying, among other things, that Hanly should be compelled to relinquish to him all his claim or title to the ten acres or any portion thereof, and alleging that Fisher Rice had, in 1794, sold and covenanted to convey to Wm. Conner one hundred acres of land, including the said ten acres; that Conner had paid for the hundred acres, and had resided thereon from 1794, until since the sheriff's sale in 1814; that the said ten acres were publicly and explicitly excepted in the sale by the sheriff, and it was clearly understood that the sale of the twenty eight acres and three quarters, was not to interfere with the ten acres, or disturb his (Blackford's) right thereto; that Shrieve, when he had purchased the twenty-eight acres and three quarters, had full notice of all the foregoing facts, and that Hanly had the like notice when he purchased from Shrieve, and never put up any claim to any part of the ten acres until 1828.

Hanly's answer does not deny the alleged notice; but Shrieve's answer denies that he had notice as charged. The truth of the allegations as to the manner of selling the twenty-eight acres and three quarters, and as to Shrieve's notice thereof, and of Blackford's claim and possession, is, however, sufficiently established by the depositions read on the hearing of the cause.

The circuit court decreed that Hanly should convey to Blackford, by deed of "*quit claim*," all title to any part of the ten acres as claimed by the latter. To reverse that decree, Hanly and Shrieve have prosecuted this appeal.

The chief objection which has been made to the merits of the decree, is, that it is in defiance of the statute against frauds and perjuries, because, as the covenant from Rice to Conner does not designate the hundred acres which were to have been conveyed, and as the bond from Conner to Blackford does not designate the precise position of the ten acres, the true locality cannot be given to either tract without resorting to a species of testimony interdicted by the statute.

A contract in writing for the sale of land, which contains no description or reference identifying the land, could not be enforced consistently with the statute against Frauds and Perjuries.

This objection is, on a superficial view, specious and imposing; but it will not stand the test of a more thorough scrutiny.

The bond from Rice to Conner contains no description or reference which could furnish a clue for identifying the land of which it acknowledges the sale; and it may therefore be conceded, that, as between Rice and Conner, or as between any person holding as a *bona fide* purchaser from Rice, and any other person claiming under Conner, a specific execution of the contract between Rice and Conner could not be decreed consistently with the statute.

But Hanly does not stand in the attitude of a *bona fide* purchaser from Rice. The recital in the deed from Rice, Conner and the sheriff, shews that *the land was sold as the property of Conner*. This is surely a sufficient recognition in writing of the title of Conner; and must operate as an estoppel against Rice and Shrieve, and Hanly as purchaser from Shrieve.

It is not material whether Conner acquired his right to the land from the vague bond alone, which has been exhibited, or from some other source, or in some other mode. The deed to Shrieve operates as plenary and conclusive proof against Rice, Shrieve and Hanly, that Conner, and not Rice, was the true owner of the land, in equity at least, and that Shrieve acquired his title—equitable, if not legal—from Conner alone; and consequently, both he and Hanly are estopped to deny Conner's title at the date of the Sheriff's sale.

As, therefore, both Shrieve and Hanly had notice of Blackford's contract, and as his ten acres were excepted from the sale, the statute against frauds and perjuries cannot be applied in their behalf, unless the bond to Blackford is insufficient.

Blackford's tract of land lies on both sides of the road leading to Lexington, and the ten acres which he bought from Conner (and as always claimed by him, and as decreed,) lie altogether on the east of the road, and adjoin his original tract on the north, in its whole extent from the road eastwardly.

The appellants insist that, according to the bond, the ten acres should be so laid off as to adjoin Blackford's

Spring Term  
1833.

Hanly &c.

vs.

Blackford.

Subsequent purchaser, whose deed recites, that the land was sold as the property of the obligee in a written contract for a title, cannot deny the title of such obligee—he is estopped by the recital.

Ten acres "adjoining him (the vendee) on the north," was rightly laid off, extending (not the whole length of his northern boundary,) but as far upon it as the vendor's land reached.

Spring Term  
1833.

*Hanly &c.*  
vs.  
*Blackford.*

Such description ("adjoining him on the north") in a bond for a title, to land of the vendor adjoining land of the vendee, is sufficiently definite to take the case out of the statute of Frauds and Perjuries.

Depositions taken upon notice to some, not all, of the adverse party, may be used against those who had notice.

No proof is necessary against those who admit the allegations of a bill, by failing to answer.

A decree should not be reversed for the improper admission of a deposition, if there was sufficient proof without it.

A remote grantor (or his heirs) from whose vendee the contend-

tract on the north, to the whole extent of his northern boundary, on both sides of the road, and that, by thus placing his ten acres, there will be no interference with Hanly.

But an important fact, decisive on this point, seems to have been overlooked by the appellants: it is, that the whole of Conner's land lay on the east of the road, and consequently, "ten acres adjoining Blackford on the north" must necessarily lie altogether on the east of the road, and should, as decreed, be bounded on the north by the dividing line between Conner and Blackford as far as their tracts were thus coterminous; and it thus appears, not only that the ten acres were sufficiently described in the bond, but that they have been properly bounded by the decree of the circuit court.

The appellants also insist, that some depositions, to which they objected, were improperly permitted to be read on the hearing; and that all the proper parties were not made.

But neither of these objections can have any effect on the decree. The only objection to the depositions (except that of Jameson,) was that the notice was served on the appellants only. The circuit court decided that the depositions thus taken were evidence against the appellants only; and to that extent they certainly were admissible. No proof was necessary against Conner, because, by failing to answer, he admitted the allegations of the bill. Nor was any proof against J. Rice necessary, not only for the same reason, but also, because the deed of 1814, was conclusive on his father and on all persons claiming under him. As the proof of the bond from Rice to Conner, was rendered immaterial by the estoppel in the deed of 1814, and the sheriff's sale, and the notice to Shrieve and Hanly, the decree, authorized as it was by the facts, independently of any proof of that bond, should not be reversed, even if the circuit court erroneously permitted Jameson's deposition to be read to prove the genuineness of the bond.

And it also appears from the foregoing view, that there is no defect of parties. Fisher Rice would not, had he been living, have been a necessary party, because



he had acknowledged, by the deed of 1814, that Conner owned the land: and consequently, the heirs of Fisher Rice could not have been necessary parties in any view of the case, as presented by the record.

Wherefore it seems to this court, that the decree of circuit court is right, and should be affirmed.

Spring Term  
1833.

*Carrico et al.*  
vs.  
*McGee.*

ing parties both  
derive title, need  
not be made a  
party to their  
suit.

*Carrico et al. vs. McGee,*  
*and*

*McGee vs. Carrico et al.*

EJECTMENT.

[Messrs. Wickliffe and Wooley, and Mr. Chapeze for Carrico: Mr. Crittenden, Mr. Richardson and Mr. Burnett for McGee.]

FROM THE CIRCUIT COURT FOR NELSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 2.

RACHAEL MCGEE, claiming as the devisee of Patrick McGee (the junior patentee,) obtained a verdict and judgment in ejectment, for sixty and one-third acres of land, against Levi Carrico and Lewis Edelin, who attempted to defend the possession by shewing a derivation of title from Banks and Stephens, the elder grantees. To reverse that judgment, Carrico and Edelin have appealed, and McGee has prosecuted a writ of error.

Statement of  
the controversy  
—Verdict and  
judgment for  
plaintiff for part  
of the land.

The appellants insist that, the circuit court erred to their prejudice, in deciding that they were estopped to set up their title under Banks and Stephens, for sixty and one-third acres, of the hundred acres in contest. And the plaintiff in error complains because the defendants were permitted to defend their possession of the residuary thirty-nine and two-third acres, by relying on a title derived under the elder grant.

It appears very clearly from the proof, that no person claiming under, or connected with, the elder grant had actual possession of any part of the land in contest from about the year 1803 to 1823, when Carrico (claim-

C. claiming, under an elder grant, adversely to M. acquired the possession by buying the

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1833.

*Carrico et al.*  
vs.  
*McGee.*

Interest of persons holding parts of the tract, under executory contracts for purchase, from M.

Such entry held to have been made, by C. under M.'s title; which neither C., nor those claiming under him, can dispute, without restoring the possession

Objected that the jury, not the court, must decide, *under what title, a party entered.*

The court must decide upon the competency of title papers, and the right to use them, and, incidentally, under what title the party entered.

The entry held to be *adverse* as to a part of the tract, not embraced by the

ing to have bought an interest from Banks, and having failed in efforts to obtain the possession by force and stratagem,) bought the interests of persons in possession under executory contracts of purchase, made in 1815, with McGee; agreed to abide by their contracts, and thus succeeded them in the possession of the sixty and one-third acres which they had occupied under their contracts with McGee. Upon that point there was no conflicting evidence.

The legal deduction from those facts is, that the entry first made must be deemed to have been made under McGee's title, because the possession was obtained from his tenants, and in consequence of contracts made with them. Consequently, as to the sixty and one-third acres, (the possession of which had been thus acquired,) neither Carrico nor Edelin (who claims to hold under him,) should be permitted to dispute the title of McGee until after they shall have restored to her the possession.

But the counsel for the appellants argue, that it was the province of the jury, and not of the court, to decide how and under what title Carrico entered. It is true that, in determining under what title the entry was made, facts must be considered: but it is equally true, that the court had a right to decide on the competency of the adversary title papers, or on the legal right of the appellants to rely on them; and, as *indispensable* to that decision, the court had a right to decide whether the facts proved that the entry was made under the title of McGee, or of Banks. *Hamilton vs. Taylor, Lit. Sel. Cases, 444.* That decision, whether right or wrong, has been recognised too often to be now disturbed. Where there are opposing facts as to the mode of entry, that case might not be conclusively applicable. But we are unwilling to withhold its full application to a case in which the tenancy is admitted, or to one in which there is no contrariety of testimony as to the character of the entry as tenant.

But, as there was no proof that the persons from whom Carrico obtained the possession, occupied, or had a right to hold or claim, more than the sixty and one-third acres, his entry upon the residue of the one hundred acres should

## OF APPEALS OF KENTUCKY.

be deemed to have been adverse to the right of McGee; or, at least, there is no proof that it was under her title. And consequently, the defendants in error were not precluded from relying on the adverse title, to protect their possession to the extent of the boundary which was not included by the lines bounding the sixty and one third acres.

It seems, therefore, that the circuit court decided correctly.

Wherefore the judgment must be affirmed.

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1833.

*Wilsons*  
vs.  
*Bibb.*

proof that the claimant had acquired the possession by contract with his adversary's tenants.

### Wilsons vs. Bibb.

TRESPASS.

[Messrs. Wickliffe and Wooley for Appellants: Mr. John Trimble for Appellee.]

FROM THE CIRCUIT COURT FOR HARRISON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 2,

BIBB instituted an action of trespass *quare clausum fregit*, against the Wilsons. They pleaded not guilty, and *liberum tenementum*. Pleadings.

In the progress of the trial, Bibb offered in evidence a patent to Samuel Meredith, of elder date than that under which the appellants claim, covering the *locus in quo*; the transcript of the record of an action of ejectment in the federal court for the Kentucky district—Meredith's lessee vs. Picket and others; a copy of the decree of the general court, in favor of Bibb against certain persons as heirs of said Meredith, for two-thirds of the land granted to him; and a plat of survey, with field notes, and other papers, shewing a division of Meredith's thousand acres between his heirs and Bibb. Evidence.

Whether these papers, or any of them, were admissible, is made a question for our decision.

After the evidence was concluded, the court, at the instance of the plaintiff, instructed the jury, "that if they Instructions.

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*Wilson*  
vs.  
*Bibb.*

Instructions—  
qualified erro-  
neously.

believed the plaintiff had possession of the premises in the declaration mentioned, at the time the trespass was committed, either by himself or his agent, such possession is sufficient to maintain the action against the defendants, unless the defendants had the legal title to said premises." The defendants excepted to this instruction.

After the argument was concluded, the defendants asked the court to instruct the jury, "that if they believed from the evidence in the cause, that, the defendants at the time the supposed trespass was committed, and at the commencement of this suit, were in the actual possession of the premises upon which the trespass was alleged to have been committed, whether that possession was rightful or tortious, the plaintiff cannot recover in this action." The court gave the instruction thus asked, with this qualification: "provided the jury also believed, from the evidence, that the plaintiff acquiesced in the possession of the defendants." The defendants excepted to the qualification. Whether the court decided correctly or not, in giving the above instructions, are questions for consideration.

In trespass *quare clausum fregit*, plea of *liberum tenementum*, and issue thereon, evidence of paramount title in either party, is admissible.

The plea of *liberum tenementum* affirmed that the defendants had title to the *locus in quo*. Issue was taken on the plea, by denying the title thus affirmed. The exhibition of Meredith's patent was unnecessary until after the defendants had attempted to shew title in themselves; but after that had been done, by reading the patent to Waller Cook and Montjoy, and the conveyances down to the ancestor of the defendants, it was clearly proper then to have admitted Meredith's patent, to shew a title paramount to that under which the defendants claimed. The action of trespass *quare clausum fregit* is founded upon the actual possession of the plaintiff, but if the defendants have title, the damage done to the close, is no injury to the possessor who has no right. The possession alone is sufficient to maintain the action against all the world, the rightful owner excepted. If Bibb was possessed, he might bring his action founded on the possession. If the defendants, under the plea of *liberum tenementum*, attempted to shew title in themselves, such attempt might be legally frustrated, by shewing the para-

monnt title of Meredith. We do not perceive any error in admitting Meredith's patent as evidence, unless it be that it was offered at a time when it need not have been. But for such a cause we would not reverse, when the subsequent proceedings shewed its relevancy.

As it respects the record of the action of ejectment in the federal court, the proceedings in the general court, and the plat and papers relative to the division between Bibb and the heirs of Meredith, their admissibility is more doubtful, but we have come to the conclusion that they were admissible, because they had a bearing upon the question of possession.

The recovery in the action of ejectment took place in 1806. Picket, the vendor of the ancestor of the defendants, was a defendant in the ejectment suit. The declaration and notice were served on him in 1804. He conveyed to the ancestor of the defendants in 1807; and the proof is, that their ancestor took possession about that time. The term of the demise laid in the declaration is fifty years. Now, for ought that appears to us, the judgment in ejectment may yet be enforced, so as to remove those claiming under Picket. If James Wilson, ancestor of the defendants, chose, (by way of compromise, as the proof conduces to prove he did,) to surrender the possession of the forty-one acres of land to Bibb, in 1824, before he had been twenty years in possession under his deed, and when there was judgment of eviction against his vendor, it amounts to a breach of that continuity of possession upon which the defendants rely for protection under the junior grant. And this leaves the elder grant of Meredith to have its full effect in falsifying their plea.

There is no proof that the persons against whom Bibb obtained his decree in the general court, were the heirs of Samuel Meredith, the patentee. The whole record is not transcribed. We cannot say whether the allegations of the bill are sufficient to shew that the case was proper for the jurisdiction of the general court. The decree, therefore, does not in the least tend to shew any title in Bibb. But taking the decree which was rendered in August, 1825, in connection with the partition made in

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1833.

*Wilson*  
vs.  
*Bibb.*

No reversal for the admission of *relevant* testimony at an *inappropriate* time.

Records, plats & papers bearing upon the question of possession, are admissible, under an issue on a plea of *liberum tenementum*.

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1833.

*Wilsons*  
vs  
*Bibb.*

June, 1824, by McCarty, the surveyor, and Montjoy and Fugate, the commissioners, between Bibb and those called the heirs of Meredith, and of all which, from the testimony, the ancestor of the defendants was apprized, we think the decree and plat legitimate evidence to shew the extent of Bibb's possession, and the ground of which he intended to take possession: and for this purpose alone we admit them under the present aspect of the record.

Possession in the plaintiff, in trespass q. c. f. at the time of the injury, or of the suit brought, is essential.— There can be no recovery where the possession in fact was with the defendant continually— although tortiously, and against the will of the plaintiff.

We perceive no objection to the instruction given on the application of Bibb. The qualification or proviso, added by the court to the instruction asked by the defendants, after the conclusion of the argument, is erroneous; and for that cause, the judgment must be reversed.

If the plaintiff neither had possession at the time the injury was done to the freehold, nor at the time suit was brought, he could not recover.

Whether an intermediate possession would, in any case, sustain the action for a previous trespass, need not be decided; for the evidence shews no such possession in the present case, and the instruction, as given, applied to the evidence. The proviso added by the court, would allow the plaintiff to recover, although the possession in fact was with the defendants continually. Such is not the law. If the defendants or their ancestors had regained the possession in fact, and were actually in possession at the time the supposed trespass was committed, and so continued up to the institution of the suit, the action of trespass *quare clausum fregit* could not be maintained against them.

Whether Bibb did, or did not, acquiesce in the possession of the defendants, cannot operate so as to subject them to the action. It is laid down that "the disseizee of land may maintain an action of trespass *quare clausum fregit*, for an injury done to the land before he was disseized." It is also said "not to be necessary that the person who brings the action of trespass *quare clausum fregit* for an injury to the land, should be in the actual possession thereof at the time of bringing the action." See *Bacon's Ab. Title Trespass, letter E.*

We know of no case where a person out of possession at the time of the trespass committed, has sustained the action of trespass *quare clausum fregit*, when he never regained the possession after the trespass. Whether by regaining the possession he would be entitled to his action, is not now the question. The proviso has made the law depend upon Bibb's acquiescence in the possession of the defendants, and we know of no principle to support the position.

Wherefore, the judgment is reversed, with costs.

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1833.  
Com'lt'h, &c.  
vs.  
Chambers.

## The Commonwealth, for the use of Webb, vs. Chambers et al.

COVENANT.

[Mr. Crittenden and Mr. Chinn for Plaintiff: Mr. Haggin for Defendant]

FROM THE CIRCUIT COURT FOR SCOTT COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 2.

THIS is an action of covenant, instituted by Webb, as Relator, upon the official bond of Chambers, as Clerk of the Scott circuit court.

Suit on a clerk's bond, for a failure to copy certain writings, in the transcript of a record,

The breach assigned is, that Chambers, in making out a record for this court, "did not transcribe certain writings upon file in the suit, and which had been used as evidence upon the trial thereof, and constituted a part of the record."

The writings alluded to, consist of various receipts and fee bills, numbered from 72 to 100, inclusive.

The suit in which it is alleged these papers should have been copied into the record, for the use of the appellate court, was instituted by the heirs and distributees of William S. Webb against the Relator, as the administrator.

The court delivered an opinion in the cause which may be found in 6 Mon. 163.

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1833.

*Com'lh, &c.*  
vs.  
*Chambers.*

Clerk failing to insert in a complete transcript of a record, any thing properly belonging to it, commits a breach of his bond.

Papers put with those belonging to a cause, but not made exhibits by the pleadings, nor read upon the trial, are no part of the record.

Admissions of items of account, before a commissioner, should appear in proof.

It is contended for the Relator, that the failure of the clerk to copy the vouchers numbered as above, deprived him of evidence which would have satisfied this court that he has expended as administrator, for his intestate, two hundred and eighty-four dollars and sixty-three and a half cents, and that his credit, in settlement of the accounts of his administration, would have been enlarged by an amount equal to that sum, if the vouchers had been copied.

The only inquiry of consequence is, did the papers numbered as above constitute a part of the record? If they did, then Chambers committed a breach of his official bond in failing to transcribe them in making out the record for this court.

We are of opinion that said papers were not a part of the record, and consequently it was not the duty of Chambers to copy them in the transcript designed for the use of this court. They were not made exhibits in any part of the pleadings. They were not read upon the trial of the cause in the circuit court.

The accounts were referred to an auditor, or commissioner, for settlement. His report, so far as the items upon which the papers aforesaid could operate, was in these words, after stating charges against the Relator, amounting to four thousand sixty-six dollars, two cents—" *Contra.* 2nd. For monies paid in discharge of debts, costs, &c. \$284 63½ cents."

The commissioner was not directed to report the evidence upon which his statements were based. He is altogether silent in regard to the vouchers. It appears that the relator had the benefit of the commissioner's Report, both in the circuit court and in this, so far as it was worth any thing to him.

Under the foregoing facts, we do not perceive the ground upon which the clerk was bound to notice the contents of a bundle of papers thrust into the cause, and, for ought that appears, not used by the parties on the trial. These papers constituted no evidence, *per se*, of legitimate charges against the estate of the intestate in favor of the administrator.

It is said that their justness was acknowledged before the commissioner, and other proof dispensed with.



That fact should have appeared by proof. It was not made to appear in the suit between the distributees and administrator.

Judgment affirmed, with costs.

Spring Term  
1888.  
*Scobee*  
vs.  
*Jones &c.*

## *Scobee vs. Jones and Lindsey.*

EJECTMENT.

[Mr. Simpson for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

*April 2.*

THE only question necessary to be determined in this case, is, whether the owner of the equity of redemption of property mortgaged to the Bank of the Commonwealth, and sold by the bank, in satisfaction of the debt due, could, by a tender of the debt, with ten per cent. interest, within the time prescribed by law, divest the bank of the legal title acquired under the mortgage. We think that he could not; that his tender only gave him the right to apply to a court of chancery to obtain from the bank a reconveyance of the title.

It is unnecessary, therefore, to determine whether, according to the proof in this case, the tender was made in proper time, or by the proper person; for, let that be as it may, the plaintiff ought to have recovered.

Judgment reversed, with costs, and cause remanded for further proceedings consistent herewith.

A tender of the sum due on a mortgage, made to secure a debt to the Bank of the Commonwealth, with ten per cent. interest, after the sale, but within the time allowed by law for redemption, will not divest the Bank of the legal title. The holder of the equity of redemption must resort to Chancery, to compel a reconveyance.

Spring Term  
1833.

**EJECTMENT. Norton et al. vs. Doe, ex dem. Sanders et als.**

[Messrs. Morehead and Brown for Appellants : Mr. Sanders and Mr. Haggin for Appellees.]

FROM THE CIRCUIT COURT FOR OWEN COUNTY,

April 3.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Judgment for plaintiff, in ejectment.

THE appellants seek the reversal of a judgment in ejectment obtained against them, upon a declaration containing two counts—one on the demise of Ann T. Sanders, the other on that of Thomas Sanders, Taliaferro Sanders, Walker Sanders and Ann T. Sanders.

Grounds for a new trial, and for reversal of the judgment.

All the grounds relied on here by the appellants, may be resolved into one general proposition—did the circuit court err in overruling a motion for a new trial, made by the appellants, on the following grounds?—1st. The verdict is contrary to the evidence. 2nd. The court erred in giving instructions for the appellee; in withholding an instruction proposed by the appellants; and in rejecting documentary and other testimony. 3rd. Surprise.

Where the bill of exceptions does not exhibit all the proof, this court cannot say that the verdict was contrary to evidence.

The points thus presented will be severally, but briefly considered, in the order in which they have been suggested.

I. This court cannot decide that the verdict was contrary to, or unauthorized by the proof: 1st. because the bill of exceptions does not profess to exhibit all the facts which were submitted to the jury; and 2nd. because the facts, as disclosed by the record, are sufficient to sustain the verdict. As a *matter of fact*, a title sufficient to sustain the verdict was indisputably established: no adversary title was exhibited, except for an inconsiderable portion of the land in controversy, and that title was junior to the patent to Robert Sanders, from which the appellee deduced his paramount right. The lapse of time cannot protect any of the appellants; no one of them, except John Norton, attempted to connect himself

Def't in ejectment, without any title, or 20 years' possession.

with any title whatever, or attempted to prove an adverse possession of twenty years ; and as to Norton, notwithstanding his effort to shelter himself under the cover of time, the jury had a right to find against him for several reasons, only one of which will be now mentioned, and that is, because the jury had a right to infer that he entered under the tenant of Robert Sanders, on whose title the plaintiff relies for maintaining his superior right to the possession.

Spring Term  
1833.

*Norton, et al.*

vs.

*Sanders et als*

sion, is not protected by lapse of time.

It is true that an abortive attempt was made to prove by insufficient testimony, that the tenant from whom Norton obtained the possession had previously bought a claim adverse to that of Sanders, his landlord. But neither such a purchase, had it been established, nor the subsequent conveyance from Sneed to Norton, in 1815, of a part of Searcy's adversary claim, would, *per se*, destroy the pre-existing legal relation and obligation of a tenancy under Sanders ; for though the tenant of Sanders may have held adversely to his (the tenant's) vendor, after a conveyance, and though the sub-tenant (Norton,) may have held adversely to Searcy after the execution of Sneed's deed, yet, surely, neither of them did, or could, in contemplation of law, hold adversely to Sanders, in consequence merely of purchases from strangers to him and to his title. Nor would the law permit either of them to question the title of Sanders until after a restitution of the possession.

The acquisition of the title of a stranger, by a tenant, will not destroy the relation between him and his landlord, — whose title he cannot question without restoring the possession.

II. No specific objection has been made in this court, to any of the instructions which the circuit court, at the instance of the appellee, gave to the jury ; nor can any, which is even plausible, be perceived, unless it lie in this — that, in two of the instructions, the jury was, in effect, told that a former judgment in ejectment, obtained in 1822, by the heirs of Robert Sanders, for the land now in controversy, and the execution of a *habere facias*, which was issued to enforce it, so far concluded such of the appellants as were parties to that judgment and such others of them as held under parties thereto, as to preclude them from relying on the duration of their possession prior to that judgment, or on any title which they may, at the time, have held.

Instructions of the circuit court deemed erroneous, but abstract and harmless : therefore not cause for a reversal.

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1833.

Norton et al.  
vs.  
Sanders et al.

There is evidently some error in this proposition. But the error was abstract and harmless.

The instructions could not have been injurious to any of the appellants who had failed to exhibit any document of title or any proof which would have allowed the application of any statute of limitations; and this suggestion seems to be applicable to all of them, except John Norton. He has no just cause for complaint.

The judgment of 1822, was obtained against several persons; but on two of them (Hume and Ruddle,) the *habere facias* was never executed. Hume is no party in this suit, and there is no proof that any of the appellants hold under him. Norton now occupies the place which Ruddle held when the judgment of 1832 was rendered against him; and consequently if he had, by proof, so connected himself with Ruddle as to have shewn an unbroken continuity of possession, he might, with some semblance of justice, have complained that he was not permitted to rely on any title or possession prior to the judgment of 1822. Though, even according to this hypothesis, it does not appear to us that lapse of time could have protected him; or that his junior claim could have availed against the elder grant. But the hypothetical case is not *this* case.

After a judgment in ejectment, the def. buys the land at a sale by the sheriff, under an ex' on against the pl'tf: & then agrees (for a consideration,) to release it to the plaintiff, abandons the possession, and, sometime after, makes the deed. In the mean time, a stranger enters—by what right, it does not appear. — Held that his possession was the possession of the plaintiff—not of the defendant and those claiming under him.

A *fieri facias*, which had been issued on a bond by Sanders' heirs to Ruddle, for his improvements, was levied on their entire tract of land (embracing the land in contest in this suit,) and Ruddle having become the purchaser, under that execution, of one thousand acres (the same which constitute the whole subject matter of this suit,) a conveyance was made to him by the sheriff in 1823. A tribunal, called the new court of appeals, having quashed Ruddle's purchase, he covenanted, in 1826, in consideration of an equivalent for his improvements, to convey his title to Robert Sanders' heirs; and shortly afterwards surrendered or abandoned the possession. In April, 1829, he made the conveyance to Ann T. Sanders, pursuant to the request of her co-heirs; but, in the mean time, by some means not disclosed, John Norton had obtained the possession of the house which had been occupied by Ruddle, and which he (Norton,)

now occupies. Under these circumstances, it is the opinion of this court, that Ruddle's possession, prior to his conveyance to Ann T. Sanders, cannot be deemed the possession of Norton, or to have been legally continued by Norton; but that it should be deemed the possession of Ann T. Sanders, and should inure to her benefit. Consequently, as Norton's possession could not have been protected by lapse of time, nothing in the instructions as given, could have been prejudicial to his rights. We will not, therefore, reverse for any abstract error in those instructions.

III. The instruction which the circuit court refused to give, declared in effect, that, if the appellants were in the adverse possession of the land "*at the date of the deed*" from Ruddle to Ann T. Sanders, and of another deed to her from her co-heirs, for the same land, those deeds were void.

This instruction was properly withheld. The deed from Ruddle was made pursuant to the executory agreement of 1826. As there is no proof or intimation to the contrary, the conveyance must be presumed to have been *bona fide*, and in execution of the prior contract, which also seems to have been fair and legal. Consequently, according to the principles ruled in the case of *Sanders' Heirs vs. Groves*, (2nd J. J. Mar. 406,) and which we still approve, the deed was not infected with champerty, even though the possession of the appellants may have been adverse to Ruddle *at the date of the conveyance*.

The same principles apply to the deed from her co-heirs to Ann T. Sanders. By her father's will, she was entitled to one thousand acres (by election,) out of any of his tracts of land which he did not specifically devise. The tract including the land now in contest in this suit was not specifically devised. *Some years prior to the date of the deed* from her co-heirs, Ann T. Sanders had elected, with their concurrence, to take the identical thousand acres afterwards conveyed to her by that deed. *in confirmation of her right under the will*: consequently, that deed does not seem to be invalidated by any law in force against champerty; of course it does not become necessary now to decide whether, if the act of 1824 had applied to the

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1832.

Norton et al.  
vs.  
Sanders et al.

A deed made to carry into effect a contract for the sale of land, of which there was no adverse possession at the time the contract was entered into, is not tainted with champerty, although the land be held adversely, when the deed is made.

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1833.

*Norton et al.*  
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*Sanders et als*

Evidence reject-  
ed in the circuit  
court.

Copies of pa-  
tents not duly  
authenticated—  
not shewn to  
include the land,  
were properly  
rejected.

Witness stating  
that he is inter-  
ested for *some*  
of those consti-  
tuting the party  
by which he is  
offered, is not  
competent.

If a witness says  
he is interested  
for *some* of  
the defendants,  
(in ejectment,) those who wish  
to avail them-  
selves of his  
testimony, must  
show that their  
defence is un-  
connected with  
that of their co-  
defendants, and  
the witness not  
interested with  
them.

conveyances, the title of the conveyors (in whose names there was a demise,) would have been forfeited to the Commonwealth, or in any way affected.

IV. The circuit court refused to admit certain documents offered by the appellants, as copies of patents to Harris and Crittenden; refused to permit the appellants to examine William Rout as a witness in chief, and refused also to permit an amended return on a writ of restitution to be read to the jury;—and of all this the appellants now complain. But we perceive no error in any of these decisions of the circuit judge.

1st. There was no sufficient evidence of the authenticity of the copies; nor was it even intimated that the appellants could have shewn by competent testimony, that either of the patents included any part of the land in contest.

2nd. Rout was offered as a witness to prove the handwriting of subscribing witnesses to a power of attorney, and stated, on his *voir dire*, that he was interested “for some” of the appellants, without designating those for whom he was interested.

As the witness was offered, without discrimination, for the *party* defendant, now appellant, and acknowledged that he was not competent as a witness for *all* of the persons constituting that *party*, he was properly rejected. *As offered* he was not competent. If he had been competent for any one of the persons defending, that person should have claimed the benefit of his testimony, and might have been entitled to the benefit of it, by shewing that his defence was unconnected with that of others in whose behalf the witness was interested, and by shewing also that the witness was competent for him. Such a state of case may have existed; though there is nothing in the record which would create a presumption that it did exist, or that would have enabled the circuit judge to have decided that Rout was competent for any particular individual of all those who were defendants. Neither the pertinency nor the effect of his testimony can be perceived. But if any inference should be indulged, the only probable conjecture reconcilable with the legal application of his evidence to the case, in any manner or de-

gree, is, that the party intended to shew some settlement upon, or derivation of some right, (under the power) to, land included by Harris' patent for forty four thousand one hundred and nine and one-fourth acres, and also to prove that the land, or some portion of the land in contest, was included within that patent. Even had this been the object, Rout's testimony would have been ineffectual, because the patent had been excluded. If the object had been to prove an adverse possession, the proof of that fact would have been equally unavailing, because whether it was adverse or amicable, the statute of limitations could not have applied to any person who could have been embraced by Harris' grant, in reference to which the rejected power was given. We cannot, therefore, consider the rejection of Rout as sufficient cause for reversal.

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*Norton et al.*  
vs.  
*Sanders et als*

3rd. The rejected return on the writ of restitution could have no legitimate effect on the case, even if it had been admitted. The court had improperly, as we think, permitted the writ, with its original return, to be read to the jury. The rejected document was an amended return. The circuit judge did not err in rejecting it; because, 1st. it was not proper to correct or counteract one error by committing another; 2nd. the amendment did not change the legal effect of the original. Besides, it did not relate to John Norton, and, as already stated, the other appellants could not have been benefitted by shewing that, as to them, there had been no eviction by the writ of restitution, even if the amended return thereon could have shewn that fact, because, nevertheless, time could not have protected them; and they neither proved, nor pretended to hold, any title.

Testimony that can have no legal effect, should not be admitted, nor used to counteract the effect of other illegal evidence.

V. After the trial, one of the appellants made affidavit, that he had, as agent of his co-defendants, defended the suit; that he was surprised by the rejection of Rout's testimony, and by the rejection of the patents, and of the amended return on the writ of restitution; and he also swore that he could have proved by Rout the boundary of Harris' patent for forty four thousand one hundred nine and one-fourth acres.

Affidavit of surprise—held insufficient.

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1893.

Davis &amp;c.

vs.

Morgan.

This affidavit will, when scrutinized, be seen to be wholly insufficient; and therefore, it has not been even mentioned in the argument of this case.

1st. It is not stated that Rout, or even any other person, could have proved that Harris' patent covers an inch of the ground for which the appellee has obtained a judgment.

2nd. There was no reasonable cause for surprise at the rejection of Rout; and when he was rejected he was offered for a single purpose only, and that was to prove the execution of a power of attorney. He was not offered to prove the boundary of the patent.

If he had been *properly* offered for that purpose, and had sworn that he was competent as a witness for any one of the appellants, doubtless, he would not have been rejected in consequence of *interest*.

3rd. As to the rejection of the amended return, enough has been already said to shew that no surprise in that particular could authorize a new trial.

Wherefore, the judgment of the circuit court must be affirmed.

CHANCERY.

### Davis &c. against Morgan.

[Mr. Richardson and Mr. Calhoun for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR HOPKINS COUNTY.

April 3.

Judge UNDERWOOD delivered the Opinion of the Court.

A Release obtained by a fraud, which the injured party is aware of, but submits to from a strong motive of interest, may be set aside by the Chancellor.

An execution in favor of Morgan, was levied on sundry slaves as the property of Benjamin and Thomas G. Davis, who, with Gordon and Morton, the replevin sureties, were the defendants.

On the day of sale, an arrangement took place, and the two Davises conveyed the slaves to Morgan, by an absolute bill of sale, for the consideration of one thousand nine hundred dollars, which satisfied the whole of the



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execution, and a part of the demands which Morgan had against them. Morgan received possession of the slaves, and exercised ownership, so far as to direct them to go after their clothes.

The slaves were seduced, probably, to take protection under the Davises, notwithstanding their bill of sale to Morgan. It is certain that they assumed the control of the slaves, and refused to deliver them unless Morgan would agree to release a large debt which they owed him, over and above the amount of the execution, and for which Gordon and Morton were sureties.

Morgan, apprehending that the Davises and their sureties were insolvent, being advised, as it appears from the proof, that he would never be able to obtain any thing unless he secured the slaves, agreed to execute the release, provided they would deliver him the slaves. He therefore executed a release, and delivered it as an escrow to McGary, to have full effect whenever the Davises surrendered the slaves to McGary for Morgan.

The slaves were delivered to McGary, who thereupon delivered the release.

McGary refused to surrender any of the slaves to Morgan until he conveyed two of them to him, which was done.

Thus, after Morgan had obtained an absolute title in consideration of one thousand nine hundred dollars, he was induced to release a debt exceeding one thousand dollars, and to part with the title to two of the slaves, in order to recover the possession of the rest.

Morgan filed his bill to be relieved from the effects of the release executed as aforesaid. He charges a swindling combination between the Davises and McGary, and admits that he yielded to it, as the best means of securing a part of his property, when the whole was in jeopardy from the lawless conduct of those who were but little better than robbers. The court decreed a cancelment of the release, but reserved to Gordon and Morton, any equity which they might be entitled to as sureties, on account of the delay; or the ability of the Davises being lessened by the contracts made with them by Morgan. This decree is the subject of revision in this court.

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We think it clear, that Morgan was entitled to all the slaves under his bill of sale. They were absolutely his. His release to the Davises; and his bill of sale to McGary, were executed with no other object, and for no other consideration, than to regain possession of part of the slaves,—the whole being withheld from him in violation of law.

The fraudulent combination and management between the Davises and McGary, are likewise manifest, but Morgan was not the ignorant victim of their fraud. He entered into the contracts with them, fully apprized of all the facts. And the question is, whether Morgan can make a successful application to the chancellor to rescind contracts not entered into by him with good faith, but with a secret intention to avoid them at the time they were made. That such was his design, we conclude from the circumstance that he well knew all the facts and impositions practised on him at the time he entered into the contracts.

The present controversy does not embrace the bill of sale executed to McGary. The release against the debt is alone the subject of decision.

In 1 *Maddock*, 299, it is said, “A Release or discharge obtained by fraud or compulsion, may be set aside; as where a scrivener ran away with £2000, which he was entrusted to lend out, and after some time writes to the party that if he will take £500 of his money, and give him a discharge, he should have it, which he did, not knowing how to come by his money; yet afterwards the creditor was relieved in chancery for the rest, notwithstanding his own release.”

This in principle is an analagous case. The creditor gave the release with a full knowledge of all the facts, yet the fraud of the scrivener, by which the creditor was induced to yield to his demand of a release, with a view to secure a part of what he was entitled to, justified the chancellor in vacating the release. In the case stated by *Maddock*, and in the present case, the releases were not executed by reason of *duress* or fear of death, mayhem or imprisonment. But a strong motive, growing out of the fraud of the parties to be benefited by the releases,

was presented; and by their fraud, the releases, as a consequence of the motive so created, followed.

If an insolvent thief takes my property, and under an agreement from me to convey him half in consideration of his surrendering the balance, he makes the surrender, will the law require me to keep faith and perform the agreement? We think not. It is an agreement superinduced by fraud, and therefore should be relieved against.

In *Jacob's Law Dic. Title, Duress*, it is said, "if a man makes a deed by *duress* done to him by taking of his cattle, though there be no *duress* to his person, yet this shall avoid the deed."

The decree of the circuit court is affirmed, with costs.

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## Cooper and others *against* Martin and others.

CHANCERY.

[Mr. Richardson and Mr. Monroe for Plaintiffs: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR BULLITT COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 3.

McDADE mortgaged to Martin two lots of ground, to indemnify him as his surety in a note to the Bank of the Commonwealth of Kentucky, and also in a note for a smaller amount to a third person.

Mortgage.

Judgment having been obtained on the latter, against McDade and Martin, an execution which issued thereon, was levied on the two lots, and the interest of both McDade and Martin therein sold by the sheriff to Cooper, at a price much beyond the amount due on the execution.

Sale of the premises, under execution, against mortgagor and mortgagee.

By an arrangement between McDade, Cooper and Gentry, previous to the sale, it was agreed that Cooper should become the purchaser of the two lots, at the sheriff's sale, that Cooper and Gentry should release McDade from debts which he severally owed them, and which with the amount due on the execution, was to be in full

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Bill for foreclosure;  
decree and  
sale.

Bill, by the purchaser under the  
execution, in  
possession.

payment of the lots. This arrangement was made on the part of Cooper and Gentry, for the purpose of securing the debts due them by McDade, he being insolvent. Immediately after the sale, Cooper was put in possession of the lots, and still retains it.

After the sheriff's sale, Martin filed his bill against McDade and Gentry, averring that Gentry had become the purchaser of the equity of redemption, and after due service of process upon both, obtained a decree of foreclosure and order of sale, became the purchaser of the lots, for a small sum, at the commissioner's sale, had his purchase confirmed, and an *habere facias* awarded him.

Cooper then filed his bill with injunction against the *habere facias*, denying any notice of the pendency of Martin's suit; praying to be quieted in his possession; that Martin might be made to release his title to him, and for such other relief as he might be entitled to.

Martin, by his answer in the nature of a cross-bill, resisted Cooper's equity; set up and relied upon the decree of foreclosure and sale under his mortgage, in bar thereof; but in case the court should deem Cooper entitled to relief, then praying a reforeclosure and sale, and claiming in that event, a priority, not only in his own favor for one-third of the bank debt paid by him, but also in favor of Churchill and Beeler, his co-sureties therein, for the other two-thirds paid by them, and to that end brought them before the Court.

They answered, claiming the lien and priority asserted for them by Martin.

On final hearing the court treated the whole purchase of Cooper as null and void, dissolved his injunction, and dismissed his bill.

Sale, by sheriff,  
of two lots—  
for more than  
the amount of  
the execution,  
is illegal.

Interest of mortgagee is not  
vendible under  
execution.

Mortgagor having  
agreed that

As the lots were sold together, and not separately, without the privity or assent of Martin; as the sheriff exceeded his authority, in selling for more than the amount due on the execution, and as the interest of Martin was not vendible at all under execution, the court certainly did right in treating the sale of his interest as a mere nullity. But the mode of sale having been the result of an express agreement on the part of McDade, for the purpose of selling and transferring in that way his equi-

ty of redemption, it is equally clear, the sale should be deemed sufficient to give Cooper at least the equitable right thereto. The only reason, therefore, for the absolute dismissal of his bill, without affording him any relief, must be that, the decree of foreclosure and sale have barred Cooper's right, Martin not having, as is contended, any notice thereof at the institution of his suit, or at the time of obtaining his decree.

From facts and circumstances not necessary to be detailed, we should have little hesitation in denying to Martin, the attitude claimed for him, of not having had notice of Cooper's purchase, if he had been charged with it, or the fact had been put in issue. But as this has not been done, we shall waive the consideration of the question, whether he is entitled to be so treated, inasmuch as the result, in our opinion, will be the same whether he had notice or not.

All the authorities agree that where a mortgagee, at the time of filing his bill, has notice of a junior mortgage, or other subsequent incumbrance, he is bound to make the holder thereof a party to the suit, or the proceedings therein will not affect him. But where he has no such notice, it has been deemed by some, an undue degree of hardship, to compel him to grope the world over in pursuit of secret incumbrances, under the penalty of rendering his foreclosure liable to be opened at a distant day, to let in the right of redemption of one whose claim could not have been ascertained by reasonable search or enquiry. *Coventry's Pow.* 306, n. G—551, n. S—989, n. C—The law, however, has been authoritatively settled, that he must incur this hardship. In the case of *Haines vs. Beach*, 3 *John. Chy.* 459, all the English cases, ancient and modern, are collated, and Chancellor Kent comes to the just conclusion, that in England the rule has been well settled, that the subsequent purchasers or incumbrancers must be parties, or the decree will not bind their rights. He conceives the necessity, for making the subsequent incumbrancers parties, or holding their rights unimpaired, to be much stronger and more indispensable to justice under the New-York practice, similar to that of this state, because the mortgagor would

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the premises should be sold under execution, the purchaser acquired his equitable right.

Junior incumbrancers, known to the senior mortgagee, should be parties to his bill for a foreclosure.

The holder of the junior mortgage, or incumbrance, or of the equity of redemption, is not bound by a decree of foreclosure to which he was no party—and will be allowed to redeem the estate—although the senior mortgagee had no notice of such claim.

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take the surplus money, after the sale of the mortgage property, and thus be enabled and tempted to commit a fraud, by not disclosing the subsequent incumbrances. "But," says he, "their rights cannot be destroyed in this way; the purchaser will take only a title as *against the parties to the suit*, and he cannot set it up against the subsisting equity of those who are not parties." We concur with him, that "this is the necessary doctrine resulting from the cases." But we cannot see, as he does, the additional force, the doctrine derives from the difference of practice in this country and England, between an order of sale, and simple foreclosure. The purchaser, under an order of sale, when the property is sold in gross, is liable to be injured to the extent of the surplus money that will go into the hands of the mortgagor, for which the purchaser will have no lien, and his claim upon the regard and protection of the court, against such contingent loss, if it does not tend to throw the preponderance of the argument the other way, must serve at least to keep the scales in *equilibrio*, and leave the question here as it stood in England. After the mortgagor had parted with the whole equity of redemption, or put a further incumbrance upon it, it might well have been insisted, that a decree against him alone, either foreclosed nothing, or only such residue of the equity of redemption as was left in him, and the rather because a simple foreclosure originated no new contract, or new consideration, between mortgagor and mortgagee. But the purchaser, under an order of sale, might plausibly insist to stand upon different ground, and claim the attitude of a purchaser of the legal estate, for valuable consideration, without notice of the outstanding equity. If the question were now an open one, it would perhaps be difficult to find a satisfactory answer to such pretension, unless it be, that the judicial proceeding against the mortgagor was in the general taken to be *in invito*, and not by consent, and that public policy forbid his being permitted to use a court of justice as an instrument in defrauding his alienees by an express consent.

The hardships and inconveniences are many both ways; and in England the subject has been treated pretty much

as an election between inconveniences. In one of the earliest cases, the chancellor admitted that it would be "extremely mischievous" to the mortgagee, to be obliged to make all persons parties who were interested; but said, he would be finally consoled in having his principal, interest and costs. But if the plaintiff should not be relieved in that case, "it would be an irreparable loss, and he thought trouble and pains less prejudicial than ruin and total loss."

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Indeed, after a careful review of the arguments for and against, it will be found much less difficult to yield assent to the rule, if it had been settled either way, because it had been so settled, than from any thorough conviction of its absolute justice and policy. See 2 *Mad. Chancery*, 188.

We think Cooper should have been permitted to redeem, upon paying Martin the amount paid by him on the bank debt, with interest and the costs of the former suit. It is true, there is no specific prayer for such relief, but under the circumstances of the whole case, we think it should have been afforded under the general prayer.

Upon a bill by the purchaser of a mortgaged estate, to be relieved from the decree & claim of the mortgagee, and for such relief as he may be entitled to, he may be permitted to redeem, under a general prayer.

If Gentry had been the purchaser, or sole proprietor, of the equity of redemption, he could not be relieved from the effect of his laches in failing to defend Martin's bill. Or, if instead of a purchase of the whole equity of redemption by Cooper, in which Gentry holds an interest to the amount of his debt, there had been a new mortgage made to them to secure the amount of their respective debts, it might have been proper, in that state of case, to give Martin the election to hold the property, by paying Cooper alone, to the exclusion of Gentry. But as his laches cannot affect the rights of Cooper, and as Cooper can only have full justice by permitting him to redeem, it is no valid objection to his being allowed so to do, that Gentry may thereby derive an eventual benefit, from which he otherwise would have been debarred—the benefit to Gentry being no matter of prejudice to Martin.

Junior mortgagee, made party to the bill of the elder, for a foreclosure, and failing to defend, will be barred.

There is no just pretext for subjecting the property to the execution debt paid by Cooper, *pari passu* with that of Martin. The sale under the execution was an extin-

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A mortgage to one of several sureties, avails the others nothing.

guishment of that debt by McDade himself, and constituted part of the consideration in the purchase of his equity of redemption.

Nor is there any better reason for the lien asserted in behalf of Beeler and Churchill, for the amount of the bank debt paid by them. The mortgage was exclusively for the benefit and indemnity of Martin, and in no way to secure them. A return of the money paid by him, with interest, is full indemnity to him, and an entire satisfaction of the terms of the mortgage.

The decree must be reversed, with costs, and the cause remanded with directions to ascertain the amount paid by Martin on the bank debt, and its value in specie at the time of payment; upon repayment of which, with interest, together with the costs of his suit against McDade, by a named day, Cooper should be permitted to redeem the property, and have his title and possession quieted: otherwise his bill to be dismissed.

CHANCERY.

### *Hoggins against Becraft &c.*

[Mr. Talbot and Mr. G. Davis for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

April 4.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Sale of an unsound horse—suit in Chancery to enjoin a judgment for the price, and rescind the contract.

THIS is a suit in Chancery, instituted by Wesley Hoggins, to rescind a contract with Aquilla Becraft, for a horse which he had bought from said Aquilla, and to enjoin a judgment which Jonathan Becraft, as assignee of Aquilla, had obtained against him (Hoggins) on a note for the price of the horse.

The bill contains appropriate and sufficient allegations; the principal of which are: 1st. that the horse was "thick or broken winded;" 2nd. that the seller fraudulently concealed the defect—and, 3rd. that, within a reasonable time after a discovery by the plaintiff, he returned the



horse to the seller, in whose possession it ever afterwards remained.

The answer denies that the horse was "unsound," or "deficient;" insists that it was not returned in reasonable time, and alleges that Aquilla Becraft had not consented to receive it, although it had continued to remain in his possession.

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Facts and circumstances of  
the case.

The following facts are satisfactorily established by the record, when scrutinized and properly understood: 1st. that the horse was "*thick winded*" at the time of the contract; 2nd. that the defect was permanent; 3rd. that it materially diminished the vendible value of the horse; 4th. that this fact must have been known by Aquilla Becraft, at and prior to the sale; 5th. that Hoggins had not, at the time of the contract, an effectual opportunity for ascertaining the defect, and was lulled by the assurances of Becraft; 6th. that he discovered, on the day of the contract, on his way home with the horse, that it made a peculiar noise in respiring, after it became heated, or when it moved briskly; but he and others, whom he requested to examine the horse, were inclined then, and for some weeks afterwards, to think that the blowing was occasioned either by a temporary "*cold*," or by "*the distemper*," then incipient and undeveloped; 7th. that it has been since ascertained, that the horse has not had the distemper since the date of the contract, that it was well kept by Hoggins, and, when returned, was, in every respect, in as good condition as at the date of the contract; 8th. that, about ten days after the date, Hoggins sent a message to Aquilla Becraft, communicating his apprehension as to the condition of the horse, and requesting him to meet him at Paris on a designated day, within two weeks, to investigate and adjust the matter; the message was forthwith communicated to Becraft, (but it does not appear that he attended to it;) the horse was sent to him about the middle of February, 1830, with an accompanying letter from Hoggins, but he did not receive the horse; 9th. the horse was left in Becraft's possession about the first of March, 1830, where it still remained in August, 1831, when the last depositions were taken in this case; 10th. the contract was made Novem-

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Vendee of a chattel, discovering a defect which the vendor fraudulently concealed, may return, or tender it back, and rescind the contract—or retain it, and recover damages.

To have a rescission of the sale of a chattel on account of a fraudulent concealment of unsoundness, there must be a return, or tender, of the chattel to the vendor, *within a reasonable time*—what that is, must depend upon the circumstances of each particular case.—While the true nature of the unsoundness (as whether it be permanent or temporary) remains uncertain, it is not too late—provided the vendee acts in good faith, and no act of his has impaired the value in the mean time.

ber 23rd. 1829; the note was assigned in April, 1830. *There was no warranty of soundness.*

The circuit court dismissed the bill, because (in the opinion of that court,) the horse was not returned within a reasonable time.

The foregoing facts are sufficient to shew that the plaintiff has been injured, and has a legal claim to redress in some mode, and to some extent.

On making the discovery of the wrong, he had a right to elect either to keep the horse, and sue for damages, or to return, or offer to return it, and rescind the contract. If he so acted as to entitle himself to a rescission, the chancellor should have decreed the relief sought by the bill.

But to entitle himself to such relief, it was necessary that he should have returned, or offered to return, the horse in a “reasonable” time, and consequently, whether he did so, or not, is the only question to be considered.

The law has not defined “reasonable time.” It cannot be defined by any prescribed rule. What is reasonable in one case, may be unreasonable in another case. What is reasonable in any case, must be ascertained by the application of reason to the facts which characterise the particular case. Delay for one week after full discovery may be unreasonable in some cases: a much longer delay may, in other cases, be reasonable. *The injured party should observe ordinary vigilance and good faith. He should not, by culpable negligence, or by design, subject the other party to unnecessary inconvenience, loss or hazard; and, whenever he offers to return the property, it should be in as good a condition as it was, when he might first have returned it after full discovery of its defectiveness, so as to place both parties, as nearly as possible, in statu quo.* All this may appear in a supposable or possible case, even though months may have interlapsed; it may not appear in another possible case in which one week had evolved. *Time, in the abstract, is not essential.* It is material so far only, as, when associated with other circumstances, it may produce injurious or unjust consequences.

The great object of the rule of law on this subject, is to prevent injury or wrong to the vendor; and the main

question in every such case, should be—"has *he* any just cause to object to the rescission of the contract?" "Has *he* been *trifled* with? Will *he* have suffered by unnecessary and improper delay?"

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The foregoing outline presents the *principle* as fully and distinctly as this court can exhibit, by any general definition, that which cannot be perfectly understood or defined, except by exemplification. Authority *directly* applicable to the facts of this case cannot be expected. And therefore, as the question involved, is one of reason and of fact, rather than of a rule of law, it may not be improper to refer to unauthoritative cases, for the purpose of exhibiting the light reflected from reason and intelligence.

In *Curtis vs. Hanny*, a purchaser of a horse, (upon warranty of soundness,) resisted a judgment for the price, by proving that the horse was diseased in its eyes at the date of the contract, and that he offered to return it *about seven weeks after he discovered* the defect. It appeared that the discovery was made the day succeeding the sale; but the purchaser, suspecting that the horse was also diseased in its feet, attempted a cure by the application of some nostrum, and thereby produced a new disease accompanied by lameness, of which, however, the horse had recovered before the tender; and it appeared that, at the time of the tender, the condition of the horse was as good as it was at the time of the sale. *No reason for not making the tender sooner, was offered, nor did it appear that the seller had sustained any loss by the delay.* In delivering his opinion on these facts, Lord Eldon, Ch. J. B. C. (among other things,) said:—"The question was, would the horse when returned to the seller, be diminished in value by this doctoring?—The seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means, diminished in value; for if a person keeps a warranted article any length of time after discovering its defects, and when he returns it, it is in a worse state than it would have been if returned immediately after such discovery, I think the party has no defence, &c. but is left to his action;" and he concluded by saying, "if the jury thought that if

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any future purchaser was to be told, that the horse had been blistered and doctored, it would diminish its value in the estimation of such purchaser, they should find a verdict for the plaintiff." (3rd Esp. Rep. 82.)

Here the distinguished Judge seemed to think, that, as the condition of the horse was as good at the date of the tender as it was when the horse *might*, first after the discovery of its unsoundness, have been returned, the contract ought to be considered as rescinded, *notwithstanding the delay of seven weeks*, unless the jury should be of opinion that the "*doctoring*" had impaired the *vendible* value.

A similar doctrine was recognised by the Supreme Court of Massachusetts, in the case of *Kimball vs. Cunningham*, (4th Mass. Rep. 502.)

In this case there is no reason for presuming that the delay was, in any respect, prejudicial to Aquilla Becraft, the seller. There is no reason for inferring that Hoggins has trifled with his interest, or attempted to speculate upon contingencies, or has been guilty of bad faith, or even of any culpable negligence; but, on the contrary, the facts authorize a deduction perfectly consistent with his good faith, candor, prudence and justice; and there is no proof that Becraft sustained any loss by not having the possession of the horse; nor can such loss be inferred from any thing which appears.

As there was no warranty, Hoggins would have had no legal cause of complaint, had the blowing of the horse been the consequence of any temporary affection—such as distemper or cold—unless he could have proved that Becraft knew and fraudulently concealed it; and this (as is now evident) he could not have proved, even had the horse been thus affected. He was told by skilful persons, that it was probable the blowing was the effect of a cold or of an incipient distemper. He had some reason to entertain that opinion. Some time was necessary to the development of the actual condition of the horse, and *weeks elapsed before it was known that the blowing was a permanent defect, originating long before the sale*, and of such a character as necessarily to have been understood by the vendor. It was certainly not the duty of Hoggins to propose a rescission of the contract before he could,

by ordinary means, have ascertained that a sufficient cause for rescission existed. And it does not appear, that he did know, or could, by the exercise of ordinary vigilance, have known that fact sooner, or much sooner, than about the time when he actually returned the horse. But, in the mean time, he had endeavored, more than once, to have the matter adjusted without a suit. When he sent the message about the first of December, 1829, he *might* have been more *punctilious*, and have made a formal tender of the horse at Becraft's house. But such form and precision were surely not necessary at that time, when he thought that the horse had "*the distemper*" for which Becraft would not have been responsible, unless he had known and concealed the fact.

Hoggins was very anxious to buy the horse, and was, therefore, not desirous to rescind *unless there was some permanent defect*. It seems that even in February, 1830, when he wrote to Becraft and sent the horse, he was not sure that "*the distemper*" was not the cause of the condition of the horse. There is no positive proof that there was a *formal tender* at that time; but there is enough to shew that Becraft must have understood that a rescission of the contract was desired, and that the horse was sent for that purpose.

Now, whatever effect the communications in December and February, should have, according to technical law, they have a strong bearing in a court of equity: they evinced a disposition by one party to do right without punctilio, and a determination by the other to evade an amicable settlement. And there is nothing in the record tending to prove, that there was any unreasonable, or even unusual, delay, in formally returning the horse, after Hoggins was *fully* and *certainly* informed of its true condition. Wherefore, as the condition of the horse, when returned, was as good as it was at any time after the sale, and even better, as the testimony may warrant us to infer; and as Becraft cannot (according to the proof,) be subjected to any injury or loss in consequence of a failure by Hoggins to make a formal tender sooner, but on the contrary, the loss, if any, must fall on Hoggins, who kept the horse well (in the winter,) without mak-

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ing much use of it, and as Hoggins seems, throughout, to have acted with candor and good faith, we cannot concur with the circuit court in opinion, that there was such an unreasonable delay in offering a rescission, as to bar the claim in a court of equity.

Moreover, if we could admit that the horse was not returned in a reasonable time, we should nevertheless be inclined to rescind the contract, because we are bound to infer that Aquilla Becraft has not only received the horse, but has appropriated it to his own use as his own, and thereby, in equity at least, waived any objection to the time of the tender.

The bill charges that the horse was "returned" to Aquilla Becraft, and remained in his possession. *He* says, in his answer, that he only received the horse to keep a few days, until Hoggins should visit him for the purpose of adjusting their controversy. But on that subject there is no proof; and there is abundant proof that he had the possession and use of the horse from the time it was returned; and he has them, we presume, even yet. Now, from these facts, we do not feel permitted to presume that Becraft never received the horse. And consequently, on this ground alone, were there no other, the plaintiff seems to be entitled to a perpetuation of his injunction, and to a decree declaring the contract for the horse rescinded.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with instructions to decree a perpetual injunction of the judgment at law.

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# Doe, *ex dem.* Ross vs. Garrison and Wife. EJECTMENT.

[Mr. Dana for Plaintiff: Mr. Marshall for Defendant.]

FROM THE CIRCUIT COURT FOR BOONE COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 4.

THIS was an action of ejectment, brought by Jesse Ross against the defendants in error, upon a demise in his own name, and another in the name of Sally Ross. At the instance of the latter, the court directed the demise in her name to be stricken from the declaration, the plaintiff in error objecting thereto, on the sole ground, that before suit brought, she had conveyed him the land sued for by deed with warranty. We do not perceive how he was thereby prejudiced, for after the conveyance to him, the action could not have been maintained upon the demise in her name, if there was no adverse possession at the time of the conveyance, and if there was such adverse possession then, the conveyance was void, and conferred no right to use her name.

Warranty of the grantor of a plaintiff in ejectment does not authorize him to insert a count upon the demise of his grantor. — The latter may have such a count stricken out, upon motion.

On the trial it was proved, on the part of the plaintiff, that the land in contest was part of five hundred acres claimed by Sally Ross to have been derived by descent to her from her father, and over which she exercised ownership for many years past; that by her permission, her son-in-law Johnson, a former husband of Mrs. Garrison, had built a house upon it. That Johnson had solicited a deed or lease for the land from her, which she refused, but agreed, he might build the house upon it, for Johnson and wife and herself to reside in. That from the time it was built, the house was occupied by all three, until Johnson left the country; after which it continued in the occupation of Mrs. Ross and Mrs. Johnson, the former exercising the principal control over the property. That some years back, whilst Mrs. Ross was absent on a visit to a distant part of the state, Garrison married Mrs. Johnson—she then residing in the house. Some time thereafter, Gar-

Plt's proof.

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rison and wife moved to Ohio, leaving the house vacant for three or four months, when they again took possession, and before Mrs. Ross got back. When they moved to Ohio, they left in the house a bed and other property of Mrs. Ross, which was removed by a witness before their return. That plaintiff and Mrs. Ross had demanded the possession eight or nine months before the institution of the suit, which he refused to surrender, stating that he did not hold under Mrs. Ross, but under his wife and one Marshall.

Def't's proof.

The defendants read in evidence, a deed, purporting to be a deed of partition of a large tract of land, among the heirs of Lampkin, of whom Mrs. Ross was one; and to convey to her and her husband William Ross, since dead, the five hundred acres before mentioned. They also proved the statements of Mrs. Ross, made previous to her deed to plaintiff, that the place where plaintiff resided, being part of the five hundred acres, was his, that another part, improved and occupied by her tenant, "was the place of a daughter residing in Washington county; and the land in contest was Mrs. Garrison's place."

Notice to quit is unnecessary, if the tenant disclaims holding under the landlord.

Various instructions were given to the jury at the instance of both plaintiff and defendants; but we need notice only the latter.

The first was in substance, that if the defendants entered and held under Mrs. Ross, and at all times acknowledged her right to the land, they were entitled to six months notice to quit, and that plaintiff could not recover, as no such notice had been given. This instruction may be strictly unexceptionable in the language in which it was couched; but it might be well on another trial, to prevent misapprehension, that it should be explained to the jury, that if Garrison had disclaimed holding under her, that would dispense with the necessity of giving him notice to quit. It does not appear from the proof, at what time of the year the occupancy commenced; but if it had been shewn, and the demand proved, had been six months previous to such period, we should think the demand of possession sufficient to ter-

A demand of possession six months before the expiration of the year, is a sufficient notice to quit.



minate the tenancy at will, at the end of the year, and of itself a substantial notice to quit.

The second, third and fifth instructions, given at the instance of the defendants, were in substance—that if Mrs. Garrison and her first husband entered on the land and held it as hers, descended to her from her father; or if they held it jointly with Mrs. Ross, as joint property, and the defendants had always held it in the same manner, the plaintiff could not recover.

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To make out the necessary proof for supporting the hypothesis upon which these instructions were based, it is contended, that upon the death of William Ross, a moiety of the five hundred acres of land, conveyed to him and wife by the deed of partition, descended to his children; and Mrs. Garrison, as one of them, having thus title to an undivided sixth, should be presumed to have entered and held by virtue of her title, and not merely by permission of her mother. The validity of this position, depends upon the question, whether a moiety of such title as was conveyed to Ross and wife by the deed of partition, descended to his children at his death. We think it did not, and that his wife took the whole.

There is a well established distinction between a joint tenancy, and the estate taken by husband and wife, under a conveyance to them jointly. Joint tenants take by moieties, and are each seized of an undivided moiety of the whole—*per my et per tout*; which though it drew after it, at common law, the incident of survivorship, or *jus accrescendi*, yet did not prevent a severance of the joint tenancy, and thereby of the survivorship, by the alienation or forfeiture of one of the joint tenants. But husband and wife, it is said, being but one person in law, there can be no moieties between them; they cannot take separate estates, under a conveyance to both, but each has the entirety, and they are seized *per tout*, and not *per my*. Nor could the husband, therefore, alienate or forfeit the estate—the whole of it belonging to the wife as well as himself; but upon his death, the whole became hers absolutely. For a like reason, it is, that if an estate be conveyed to husband and wife and to a stranger, the hus-

An estate conveyed to husband and wife, is *not a joint tenancy*. Each takes the entirety, not a share which can be severed (*per tout*, and not *per my*.) The husband cannot alienate, or forfeit, the estate; and, on his death, the whole becomes hers. The Kentucky statute, abolishing the *jus accrescendi*, does not apply to the estate of husband and wife.

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band and wife will only take one moiety, and the stranger will take the other moiety. *Lit. Sel. Ca.* 291—2 *Cruise's Dig.* 508. The estate so taken by Ross and wife, not being a joint tenancy, is not embraced by the terms, nor can it by any fair construction, be brought within the provisions of the act of 1796—2 *Dig.* 685, which abolishes the *jus accrescendi* as between joint tenants.

The same view has been taken of the effect of a similar act of New York, on this subject—See 4 *Kent's Com.* 358.

Remark of a mother, that land (to which she had the better title) was the place of her daughter, may imply an intention to give it to the daughter, a parol gift, or the like; but should not be construed into an admission of an adversary title in the daughter.

The original entry and subsequent occupancy of Johnson, having been by the mere permission of Mrs. Ross, and the effect of the deed to Ross and wife being such as just stated, there was no proof upon which the 2nd, 3rd and 5th instructions could have been hypothecated; unless such effect should be given to statements of Mrs. Ross, (detailed in evidence,) that the land in contest was Mrs. Garrison's place. But this we think, cannot be fairly done. The utmost effect, that could be given to that part of the testimony, under the circumstances, would be, that it proved, either an intention to give, a promise to give, or a parol gift of the place, by Mrs. Ross to Mrs. Garrison; neither of which would have changed the original character of the possession, from an amicable to an adverse one; or from being subsidiary to, and dependent upon Mrs. Ross' right, into an independent possession, dependent upon Mrs. Garrison's right alone. It could have made of the latter, at most, but a tenant at will or sufferance.

The fourth instruction was—"that if the jury believed, from the evidence, the land was held and possessed by the defendants as their own property, and adversely to Sally Ross, at the date of her deed to Jesse Ross, that said deed was void, and he could not recover."

The abstract proposition embraced in this instruction, need not be gain-said; for we deem it wholly abstract, and therefore erroneous. Garrison, on his marriage, succeeded to the possession which his wife had at the time of their marriage, and until a restitution thereof to Mrs. Ross, he could thereafter hold only as his wife then held. There was, in fact, no evidence of even the assertion of

Instructions entirely abstract, are erroneous.

an adversary holding, except at the time the demand was made of a surrender of the possession, which was subsequent to the date of the deed.

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Judgment reversed, with costs, and cause remanded with directions for a new trial, and further proceedings consistent herewith.

## Brown's Heirs against Brown's Devisees.

CHANCERY.

[Mr. Richardson and Mr. O'Hara for Appellants : Mr. Crittenden for Appellees.]

FROM THE CIRCUIT COURT FOR GALLATIN COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 4.

JOHN BROWN, a bachelor of advanced age, died possessed of a large and valuable estate. By his will, he manifested a determination of dying intestate as to no part of it, and appeared particularly solicitous that his intentions, as to the mode of its disposition, should not be frustrated.

J. Brown's will.

The principal and nearly sole objects of his bounty seems to have been an illegitimate son called John Brown, an infant of tender years, who died after the date of the will, but before the testator ; an illegitimate daughter, Clarissa H. Pike, and her daughter, both of whom survived him.

After his death, his heirs filed their bill against his devisees and administrators with the will annexed, claiming the whole of the estate, real, personal and slaves, devised to John Brown the son, and the circuit court having dismissed their bill, they prosecute this appeal.

Bill, by the heirs, against the devisees.

The following are so much of the different clauses of the will, as are necessary to elucidate the grounds of controversy between the parties.

"It is my will, and I hereby give to my son John Brown my homestead plantation, stock, furniture, slaves &c. and to his successors forever ; but should this, my son

Devise to J. B. (the son,) and if he dies before 21, or with-

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out issue, then  
to Mrs. Pike for  
life, remainder  
to her daughter.

Devise to Mrs.  
Pike—&c.

Residuary de-  
vise to J. B.  
(the son.)

Chancery has  
no jurisdiction  
of the suit of the  
heirs, to recover  
the real estate  
devised to oth-  
ers—the reme-  
dy is at law.

John die before he arrives at the age of twenty one years, or without issue, then and in that case, all that is hereby given to this my son, shall be the inheritance of my daughter Clarissa H. Pike, during her natural life, then to pass to her daughter Clarissa B. Harrison, and to her successors forever, in the line of descent from me. Could such a failure take place as the extinction of the line of Clarissa H. Pike, the true intention is, this estate reverts to my brother and sisters, or their descendants, in legal right, save the estate herein named, lying on Never-sink, in New Jersey, which it is my will, and I hereby order, shall pass to my nephew John Brown," &c.

"It is my will, and I hereby give to my daughter Clarissa H. Pike, all that certain tract of land, &c., also one equal half of my stock in the Miami Exporting Company—sixteen shares, thirty two in the whole, to her and her successors. But should my daughter Clarissa die and all her progeny, this landed estate to return into the hands of my son John, to remain his and his successors' forever."

"As my daughter Clarissa has had her bringing up, with her education, with her daughter Clarissa B. Harrison's, at my expense, with other property and money given to both, and as John is now an infant, and yet to receive his education, to complete which it is my will, and I do hereby give to this my son, the residue of my estate, not heretofore given away; that is, the other half of my Miami Bank Stock, sixteen shares, with any balance due me from said bank for deposits: all claims or title of land I may have at my death, in any of the United States, all bonds, notes, claims or contracts, dues and demands of whatever nature or kind, I may be the owner of."

As to so much of the bill as goes for a recovery of the real estate, the Court properly dismissed it for want of jurisdiction. If the complainants have any right thereto, their remedy was at law, and there is no reason shewn for resort to equity.

Their claim to the slaves and personal estate devised to John the son, is based on two grounds: *first*, because the contingency on which Mrs Pike was to take, was too

remote, and the devise over to her, therefore void; and, *second*, because the whole became lapsed, and descended to them, by reason of the death of John the son, in the life time of the testator. They further insist, that they are at least entitled to the property embraced by the residuary devise, because, as they contend, there is no devise over of that, to Mrs. Pike.

As it regards the slaves, two questions present themselves, and might properly be discussed in this case. *First*, whether, notwithstanding the act of 1800, which directs slaves to pass by will as land, the act of 1798, 2 Dig. 1156, still restrains a deviser from limiting them, otherwise than a chattel personal is limitable by the rules of the common law. *Second*, whether the distinction, mentioned in the books, as to the difference of construction given to the words, *dying without issue*, when used in a devise of realty, and when used in a devise of personalty, actually exists, or is based upon tenable principles. But we shall waive a decision of both those questions, and dispose of the claim asserted under the first devise, on the ground that the real estate passed thereby to Mrs. Pike. For it must be admitted, that if the land passed to her, the slaves and personalty passed also.

The questions, raised upon the first devise, even when treated as a devise of land alone, though of importance on account of the property involved, are of no intrinsic difficulty; for they will be found, on examination, to have been long and well settled.

The first is, whether the devise over to Mrs. Pike and her daughter, if "this my son die before he arrives at the age of twenty one, or *without issue*," be upon a contingency too remote, to be allowed to take effect according to the rules of law. This depends upon another question: that is, whether an indefinite failure of issue, was meant by the testator, or such failure at the time of the son's death. If the latter, then the limitation is good. And that he intended the latter, we think, results, not only from the natural and proper signification of the terms as used, but from all the cases and authorities on this subject.

The phrase "*dying without issue*," is said to have two significations; the one legal and artificial, that is, an inde-

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Questions upon the descents, devises and limitations over of slaves, under the statutes of Ken. suggested, and waived.

A devise to J., the son, and if he "die before he arrives at the age of 21, or *without issue*," then to C. &c. construed to mean a failure of issue at the time of the son's death, and held to be a good limitation.

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*finite failure of issue*; the other natural and common sense, that is a failure of issue, living at the time of the death. The first is said, always to obtain in devises of land, unless there be other expressions or circumstances on the face of the will, to control it otherwise.

In the case of *Moore vs. Howe*—4 Mon. 204, this Court said, “the expression, dying without issue, has been construed to mean an indefinite failure of issue, only because it was supposed, when taken alone, to indicate such to be the intention of the testator; but when the devise over must take effect, if it takes effect at all, in the life of a person in being, it is plain, that to construe the expression to mean an indefinite failure of issue, would be inconsistent with the intention of the testator, and to effectuate that intention, therefore, the expression, dying without issue, ought and must, in all such cases, be construed to be a dying without issue living at the time of the death, on which the devise over is made to depend.” It was accordingly held, that this rule applied to, and governed, the construction in that case, because the devise over was of an estate for life only. See, also, *Moseby vs. Corbin*, 3 Mar. 289.

In confirmation of this rule, we may refer to the language of Mr. Fearne, in his work on Executory Devises—p. 376: “Though an executory devise in *tail* or in *fee* to one in *esse*, to take place after a dying without issue, is void, yet an executory devise for *life* to one in *esse*, to take place after a dying without issue, may be good; because, in the latter case, the future limitation being only for life of one in *esse*, it must necessarily take place during that life, or not at all, and therefore the failure of issue, in that case, is confined to the compass of a life in being.” See, also, 3 Saund. 388, c.

According to this rule, the devise over to Mrs. Pike, being for life only, the testator must be understood to mean, a dying without issue at the time of the son's death. Consequently, the contingency was not too remote, and Mrs. Pike and her daughter could well have taken, though the son had not died until after the testator.

Nor does his death previous to that of the testator, affect their right. *Moore vs. Howe, supra*. On the contrary, that circumstance would have enabled them to take, when otherwise they could not have done so, on account of the remoteness of the contingency, had he survived the testator, and the estate been vested in him. In the case of *Fuller vs. Fuller, Cro. Eliz. 422*—where a man devised land to his second son R. and to the heirs of his body; and after his death, without issue, to his third son E. and R. died in the life of the testator, leaving children who survived him, it was held that E. should take the land presently; for, as there said, the devise to R. being void, it is as if it had never been made. See, also, the case of *Hutton vs. Simpson, 2 Vernon, 722*, to the same effect—*2 Bac. Ab. Tit. Devise, p. 86. Gulliver vs. Wicket, 1 Wilson, 105—Lowndes on Legacies, 412.*

Whether Mrs. Pike can take the property embraced in the residuary devise to John, the son, is a question of more difficulty, and about which we have entertained some doubt. It turns upon the effect to be given to the words in the first clause above quoted, "all that is hereby given to this my son, shall be the inheritance of my daughter" &c. Does the word *hereby*, refer merely to that clause of the will in which it is found, or to the whole will, embracing every thing devised by it to the son? It must be conceded, that if it stood alone, without any other controlling circumstance, its application, either way, would be somewhat arbitrary. The other circumstances lean both ways, and leave the matter nearly as it would be without them.

In favor of the restrictive application, there may be urged, first, the mode of giving the remainder over to the son, limited on the devise to the daughter, "this landed estate to return into the hands of my son," pretermittting *ex cautela*, as it would appear, her half of the bank stock, &c. the other half constituting the first item of enumeration in the residuary devise. Second, the term, "this estate," used in making provision for his brother and sisters after the failure of Mrs. Pike's issue, which would seem to have a more natural and rational reference to

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If an estate is devised to one, and in case he dies without issue, then to another, and the first devisee dies in the life time of the testator, the devise does not lapse, but passes to the second devisee—otherwise, if the first devisee survives the testator.

The testator, in the first devise—to his son, declares that, if the son die without issue, "all that is hereby given to my son, shall be the inheritance of my daughter;" and by the last clause, devises the residue of his estate to the son, without any mention of the daughter. The son having died without issue in the life time of the testator—held, upon the presumed intention, as indicated by the entire will, that the daughter was entitled to the "residue," by virtue of the limitation in the first devise.

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the estate devised by that clause, than to the whole of the devises to the son, including those thereafter to be made.

*Third*, the manner of qualifying the limitation over in favor of his nephew, "save the estate *herein* named, lying in New Jersey," &c. which might be supposed to point still more clearly to the property devised by that clause of the will, as the one alone, which the testator then had in his mind, and to which all the limitations over were applicable. *Fourth*, the actual collocation of the word hereby and of the whole limitation over in favor of Mrs. Pike, which enables the court fully to satisfy the language used, without extending it beyond the devise embraced by that clause.

But the circumstances in favor of the broader construction, are perhaps still stronger, and have lead us to the conclusion, that the intention of the testator will more probably be effectuated thereby. They are mainly and briefly these: *first*, the manifest intention of devising his whole estate, to the almost total exclusion of his heirs and legal distributees. *Second*, his two illegitimate children were the sole and nearly equal objects of his regard and munificence. *Third*, as to the principal devises to both, in case of the death of either without issue, he gives the property over to the other surviving. *Fourth*, he introduces the residuary devise, with an apology or explanation to his daughter, for giving the whole of it to his son, and thereby creating an inequality in the division of his estate between them. He addresses no such apology to his brother and sisters. Now, this apology would not have been full and satisfactory, as he no doubt intended it, unless he supposed he had provided for his daughter, taking this part of the estate also, in case the son died before her without issue. The apology implies, that but for the son the whole would have been given to her. There is strong reason, therefore, for presuming he intended to give her, or thought he had given her, the same benefit of survivorship as to this property, that he had secured to the son, as to the whole of the property devised to her, except the sixteen shares of bank stock, which it appears, were of but lit-



the value. And as the language used in creating the limitation over in her favor, is broad enough to admit this interpretation, we shall adopt it as best calculated to effectuate the intention of the testator.

Decree affirmed, with costs.

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*Deason &c.*

vs.  
*Boyd &c.*

## *Deason &c. against Boyd and O'Hara,*

CHANCERY.

[Messrs. Morehead and Brown for Appellants : Mr. Monroe for Appellee]

FROM THE CIRCUIT COURT FOR TRIGG COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

*April 5.*

In March, 1815, Lacy sold his wife's share in the estate of her deceased father, Young, to Clinghan, for a keel boat ; in May, Lacy came of age; in June or July, he sold the boat to a third person, and in 1816, Clinghan sold the share of Young's estate to O'Hara. Lacy had information of the transfer to O'Hara ; but for about ten years, never did any act towards avoiding his contract with Clinghan, or notified O'Hara, or Boyd's administrator, of an intention to do so.

The avoidable acts of an infant will be confirmed, by slight acts and circumstances, after he is of age.

If one makes a contract during infancy, and after he comes of age, sells the property acquired under it, and fails, for a long time, to give notice of a disaffirmance, he is bound by the contract.

Can he now be permitted to avoid it, on the score of infancy ? We think not.

Slight acts and circumstances are said to be sufficient, to confirm the voidable acts of an infant, after he comes of age. It has even been held, that he is bound to give notice of disaffirmance, within reasonable time after coming of full age. However this may be, we entertain no doubt, that, where he has done such an act of affirmation, as selling the boat in this case, it will, when taken in connection with his failure for so long to notify a disaffirmance, amount to such confirmation as precludes him from avoiding his contract. *2 Kent's Com. 194, Bing. on Infancy.*

Decree affirmed, with costs.

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SCIRE FACIAS.

## Lowry vs. Drake's Heirs.

[Mr. Cunningham and Mr. Davies for Plaintiff: Mr. Haggin and Mr. Hewitt for Defendants.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

April 4.

Chief Justice ROBERTSON delivered the Opinion of the Court.

*Scire facias* on a judgment of eviction.—Plea, that the judgment was entered, by agreement, with a condition annexed, that if the debt paid, &c.—Replication; that plaintiffs were infants when the agreement was made. Demurrer, decision, &c.

To a *scire facias* for reviving a judgment of eviction, which had been obtained by Drake's heirs, against Lowry, the latter pleaded, that the judgment had been entered in consequence of an agreement (and which was a part of the judgment,) that, if he should, within thirty days, pay in the clerk's office, to be received by the lessors, one hundred and eighty five dollars, with interest thereon from the 24th day of September, 1808, in lawful money of the United States, the judgment should be void; and that, if he failed to make such payment, he relinquished all claim to the land, and consented that an *habere facias* might be issued after the expiration of the thirty days; and averred that, within the thirty days, he did deposite with the clerk of the court, according to his undertaking, the sum of one hundred and eighty five dollars, with interest thereon from the 24th of September, 1808; whereby the judgment was satisfied and rendered void.

The lessors replied, that they were infants at the time of making the agreement set forth in the plea.

The circuit Judge having overruled a demurrer to the replication, because he considered the plea insufficient, Lowry rejoined, and took issue on the infancy; which was found against him by the jury. Whereupon judgment for execution, was rendered: to reverse which judgment, this writ of error is prosecuted.

Plea, to a *scire facias* on a judgment, that the agreement by which a condition was annexed to the

The issue was immaterial. Whether the agreement be a part of the judgment, or the judgment be only a consequence of the agreement and distinct from it, the infancy of any of the parties, was insufficient to invalidate the condition on which the judgment was permitted

to be entered, or to entitle the infants to the benefit of a judgment unaffected by the condition. And when they ask for another judgment reviving the conventional judgment, the fact that the agreement on which the latter judgment was founded, had been fulfilled, would be sufficient to bar all right, to a judgment for execution. If they could renounce the agreement, the court will not, in the event of their doing so, give them another judgment, for enforcing that which they obtained by making the agreement.

But if the plea be insufficient, the immateriality of the issue cannot affect the judgment; for it is well settled that the party first in fault shall not take advantage of the immateriality of an issue superinduced by his own blunder. And therefore, though the rejoinder may have waived the demurrer, we will consider the plea as well as the replication.

The only objection which has been made in this court, to the plea, is, that it does not expressly aver that the money was deposited with the clerk *for the defendants* in error. But it seems to us that the averment that the money was deposited with the clerk by Lowry, "*according to his undertaking*," should be understood as meaning that it was deposited *for the defendants*. "*His undertaking*" means his part of the agreement, which was described in the plea; and that undertaking, (*as described in the plea*), was to pay the stipulated sum in the clerk's office, *for the use of the defendants*. As the purpose or mode of the alleged deposit is a matter of fact, and not of law, it was not necessary to aver the payment to the clerk in the language of the agreement, or to aver specifically that the money was deposited for the defendants. Any form of averment which, by a rational interpretation, must import a deposit for their use, is sufficient. If Lowry did deposit the money "*according to his undertaking*," he made the deposit to the use of the defendants.

The plea does not aver that the money was paid in the clerk's office: and it may, therefore, be possible that it was handed to the clerk, not only out of his office, but out of the State, so that the defendants did not, and could

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vs.  
*Drake's heirs.*

judgment, was made while the party was an infant, is insufficient, and the issue, on the allegation of infancy, is immaterial.

A party cannot disaffirm an agreement, made while he was an infant, that a judgment, with a condition, should be rendered in his favor and have the benefit of the judgment, without the condition.

If the plea be bad, and an immaterial issue be formed on the subsequent pleadings, and found for plaintiff, the judgment will stand; for the defendant, having committed the first fault, cannot take advantage of the immaterial issue.

Pleas are to be taken according to the common understanding of the terms used.—Plea averring an agreement that def't should 'pay in the clerk's office, to be received by the lessors,' &c. and then averring, he did deposit (the sum) with the

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vs.

Lee's Execu-  
tors &c.

clerk, accord-  
ing to his un-  
dertaking,  
(without saying  
for the plain-  
tiff,) is suffi-  
ciently certain.

not, get it : but such a deduction is too remote and unreasonable to be indulged when substance, and not form—common sense, and not artificial rule—are the tests to which pleading, and the language of pleading, are to be subjected. The payment was to be made to the clerk, because he was an officer of the court ; and whether it was made within the walls of the clerk's office, or at his private dwelling, could not be material. And, even had it been indispensable that the deposit should have been made in the clerk's office, the averment imports that it was so made.

Wherefore, as the issue is immaterial, and the plea is substantially good, the judgment of the circuit court must be reversed, and the cause remanded for a repleader, and such further proceedings as shall be consistent with this opinion.

CHANCERY.

### Lee against Lee's Executor and Others.

[Mr. McHenry for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

April 6.

Judge NICHOLAS delivered the Opinion of the Court.

Widow is not entitled to dower in the slaves of the husband, emancipated by his last will and testament.

THIS is a claim asserted by a widow to dower in several slaves, emancipated by the will of her husband, she having renounced its provisions.

The 24th section of the act of 1797, concerning wills, 2 Dig. 1246, says, that upon renunciation of a will by the widow, "she shall be entitled to one-third part of the slaves whereof her husband died possessed, which she shall hold during her life &c."

By the 27th section of the act of 1798, 2 Dig. 1155, it is declared lawful "for any person, by his last will, or any other instrument under his hand and seal, attested and proved in the county court, by two witnesses, &c. to emancipate his slaves"—"saving, however, the

rights of creditors and every person or persons, bodies politic and corporate, except the heirs or legal representatives of the person so emancipating such slaves."

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Had the legislative action on this subject stopped here, as appears to have been supposed by those who assert the claim of dower, there would be room for a difference of opinion, whether the widow's right to dower, was reserved to her, under a proper construction of these two acts, when taken in connection with the constitutional mandate to the legislature to prescribe a mode for emancipating slaves. But all difficulty is removed by the act of 1800, 2 Dig. 1247, which provides, "that any person of the age of eighteen years, being possessed of or having a right to any slave, may, by his last will, or by an instrument of writing, emancipate such slave." This act gives the right of emancipating by will, untrammelled by any reservation whatever in favor of the widow's right of dower, and, as we understand it, excludes all pretence of such claim.

It cannot properly be objected to this construction, that the act of 1800, applies only to infants above the age of eighteen, and was adopted exclusively to enable such infants to emancipate their slaves. The same reason would require it to be so construed, as not to enable adults to emancipate, except by recorded deed, as required by the previous act. But by several decisions of this court, it has been construed to allow adults, as well as infants, to emancipate by an unsealed, unattested and unrecorded instrument of writing. Consistency requires the same construction, as to the power of emancipating by will.

Decree affirmed, with costs.

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## Hodges vs. Holeman.

COVENANT.

[Mr. Dana for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

April 6. Judge NICHOLAS delivered the Opinion of the Court.

Covenant sued upon,—with an agreement endorsed.

HOLEMAN sued Hodges, in covenant, and obtained a verdict and judgment against him, on the following obligation :

“On or before the first of April, 1827, I promise to pay Jacob H. Holeman, or order, one thousand dollars, in Commonwealth’s paper, for value received of him, this 13th July, 1826.  
*A. G. Hodges.*”

On the back of which was endorsed this agreement:—  
“It is distinctly understood between the parties to this obligation, that all liens, mortgages or incumbrances whatever, shall be removed by Jacob H. Holeman, from and on his share of the Commentator office, before A. G. Hodges shall be forced to pay this note.

*J. H. Holeman,  
A. G. Hodges.*”

Averment—that the only incumbrance was removed.

The declaration avers that the only lien, mortgage or incumbrance existing on Holeman’s share of the Commentator office, at the date of the obligation and endorsement, or since, was one in favor of the bank of Kentucky, which, on the 15th July, 1831, was discharged and released.

Pleas, alleging subsisting liens.

Hodges filed ten pleas in substance as follows:—

Where there was an agreement, endorsed on a covenant, for the payment of money, that obligee should remove all liens, &c. from certain property, before the obligor should be forced to pay—

*First*, “That at the time of making the obligation and endorsement, there was a partnership in the Commentator office, and in the printing business then, and there carried on, between Holeman and James G. Dana; that the office was then held by them jointly as partnership property, by virtue whereof Dana held, and still holds, a lien upon the interest of Holeman, for the payment of certain debts due from the firm, and to secure Dana the payment of any balance, which might be found due him, up-

on the liquidation and final settlement of the partnership accounts, which still remained unsettled."

The court properly sustained a demurrer to this plea. It shews at most, but a state of case in which an eventual lien, or liability, might arise in Dana's favor, provided he should thereafter pay Holeman's share of the partnership debts: a contingency that might never happen; and admitting a lien in his favor for any balance that might be due him, cannot constitute a present lien, unless there is, or will be, such balance in his favor. The plea goes upon the erroneous idea that Hodges was not bound to take upon himself to shew a balance in Dana's favor, and that the circumstance of the accounts being unliquidated, created an incumbrance, such as justified withholding payment. The endorsement does not require a settlement of the partnership accounts, and unless it be shewn there is a balance in Dana's favor, the court cannot say he has any lien. The difficulty and inconvenience of making such proof in a court of law, cannot alter the question. It is purely a legal one, of lien or no lien.

*Second:* "That at the date of the obligation &c. Dana held a lien upon the interest of Holeman in the Com-mentator office, and being proprietor of the remaining interest, had possession of the whole, and, to maintain his lien, still holds the possession." To this plea the plaintiff replied, traversing its allegations; and Hodges rejoined in a long, circumlocutory reassertion of them. Upon demurrer to the rejoinder, the court adjudged the plea bad. The rules of pleading require, that the plea should have shewn what was the nature and character of the lien with more precision.

*The third,* after stating the partnership and co-proprietorship of Holeman and Dana, avers, that in carrying on the "business, Dana had expended divers sums, to the amount of five thousand dollars, for the reimbursement of which he held, and still holds, a lien &c." To this the plaintiff replied, that before the partnership with Dana, he had conveyed the whole office in trust to secure a debt due the bank of Kentucky; and at the time of its formation, Dana conveyed to him, in mortgage,

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a plea averring an existing state of facts, from which a lien might thereafter arise, (or might not) is insufficient.

The plea (in such case) must shew the nature and character of the lien.

The lien of a partner, for a balance (on the partnership accounts,) is not an incident of the legal title to the effects; but results from the partnership, and is not affected by the mortgages of either partner on his share.

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his (Dana's) share, which deed of trust and mortgage were both still in full force at the time of the sale to Hodges, when he became the partner of Dana, in lieu of Holeman, and they used the partnership property in common, and avers, "that the only lien, mortgage or incumbrance whatever, on his share of said office, at the time of making the endorsement, was said deed of trust, which has been released, discharged, &c."

On demurrer to this replication, the court adjudged the plea bad. We think the plea contains a substantial averment of a lien in Dana's favor, and that the replication, so far as it goes in avoidance, is insufficient, and so far as it is in negation, is not properly responsive to the specific lien alleged in the plea.

We perceive nothing in the circumstance, that the whole partnership interest, and that of one of the firm, were mere equities of redemption, to take from the latter, the lien recognised by law, in favor of partners generally, for the balance due them. The lien is not incident to, nor does it grow out of, the legal estate, but results from the connection as partners, and is appurtenant to the beneficial proprietorship, without reference to the temporary lodgement of the legal title. And if there be any utility in the rules of pleading, after the defendant had set forth a particular lien, it cannot be permitted the plaintiff to waive a traverse of that, and go back to the original negative averment of his declaration.

The demurrer to the replication should have been sustained.

Plea, that a lien was asserted, held to be bad.

Where the obligation is for payment on a day certain, and an endorsement stipulates that all incumbrances, liens, &c. shall be removed before the obligor shall be lost, by a

*The fourth* plea has no semblance of merit. It merely states, that Dana asserted a lien in his favor.

*The fifth* is also bad: it merely states, that the incumbrance in favor of the bank of Kentucky, was not removed on or before the 1st. April, 1827. The endorsement does not make the obligation void, if the incumbrances are not removed before the day of payment, but merely postpones the right to demand payment till they are removed.\*

be forced to pay— the right to demand payment, is postponed, not wholly failure to remove the liens *by the day*.

\*On the 6th, 7th and 9th pleas, issues of fact were formed.



*The eighth* states, that Dana was asserting a lien by bill in equity, for a balance claimed to be due him, as partner, but does not aver any balance to be due him. The suit could give him no lien, if he otherwise had none, nor did it constitute an incumbrance, such as the plaintiff was bound to remove.

*The tenth* states the partnership, that the Commentator office was part of the partnership effects, held in equal shares; that during the partnership, and after its dissolution, Holeman drew large sums, over and above his rightful share of the capital and profits, whereby Holeman became indebted to the firm ten thousand dollars, and to Dana five thousand dollars; for the payment of which, before and at the time of making the obligation and endorsement, Dana held a lien on Holeman's share of the office, and, it being unpaid, still retains it &c. To this the plaintiff demurred, and the court having sustained the demurrer, the sufficiency of the plea presents the principal question involved in the case.

Each partner has a lien on partnership property, for any balance that may be due him on settlement of partnership accounts, whether this balance arise from advances made to the firm, by one partner, or from overdrafts made by the other. Execution creditors, or assignees, of a partner, stand in his shoes, and are entitled only to his share, after the other partner is satisfied all just debts, demands and allowances, due him in that character. *Nicoll vs Mumford*, 4 John. Chy. 525. *Rodrigues vs. Heffernan*, 5 Ibid, 424. *Gow*, 365-391. It would seem, therefore, that where A. and B. are joint partners, that claim which A. has on the partnership property, to indemnify him for the over-drafts of B. must, literally and strictly speaking, be a lien and incumbrance on the share of B. in the partnership effects, as between A. and B. or the assignee of B.

These principles have not been seriously controverted in argument, so far as they apply between partners, or the purchaser of one partner's interest under execution. But in behalf of Holeman, a distinction has been attempted, on the assumption that this was not a mere sale of Holeman's interest in the partnership property,

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The pendency of a suit, by which a balance, and lien to secure it, is claimed, does not constitute an incumbrance within the purport of such endorsement.

Each partner has a lien, by operation of law, upon the partnership effects, for any balance in his favor, upon the partnership accounts.

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but a sale by him of a moiety of the partnership effects, or materials for carrying on the printing business, which, by law, as partner, he had a right to make, and by virtue of which the purchaser acquired a right to an undivided moiety in co-tenancy with Holeman and Dana. We see no pretext for any such view of the case. It is not at all warranted either by the defeasance, or the plea. An individual sale by him in his own name alone, of his share in the office, by no construction, can be made to mean a sale, for both, of an undivided half of the shares of both.

A stipulation to remove all liens, includes the lien of a partner, for his balance on the partnership accounts; and the failure to remove such lien — the removal being a condition precedent, — may be pleaded and relied on at law.

It is further said, this could not have been such a lien or incumbrance, as was contemplated by the defeasance. Why not? No reason occurs to us, why its removal should not be stipulated for, as well as any other.

But if it was contemplated, and stipulated for, then it is insisted, because a court of law would not entertain jurisdiction of an original case between Dana and Holeman, to settle their accounts, neither will it try such matters collaterally, and that, therefore, the defence ought not to be allowed. This argument would rather go to defeat Holeman's right of action at law, than take away Hodges' defence. For if there be such a lien in Dana's favor, it was the plaintiff's duty to have shewn it, and that it had been removed, and this the argument would preclude him from doing in a court of law.

An obligation for the payment of money, with a condition endorsed, that obligee shall remove all incumbrances from certain property, before the obligor shall be forced to pay — is a dependent covenant, upon which no action lies, without a performance of the condition.

Another ground relied on is, that the stipulations contained in the defeasance, were only *part* of the consideration for the covenant, and in consequence thereof is to be treated as an independant covenant, and not in the light of a condition precedent. This is a total misapplication of the rule of pleading, that where plaintiff's covenant constitutes only part of the consideration for that of the defendant, and the defendant has received partial benefit, and the breach on the part of the plaintiff can be compensated in damages, an action may be supported without averring performance. We should have some hesitation in saying, the endorsement contained any express covenant on the part of Holeman to remove the incumbrances, or that it was not at his election to remove them at all, provided he chose to forego

the collection of the money from Hodges. But conceding that it does amount to a covenant on the part of Holeman, for the removal of incumbrances, it is by no means necessarily inferrible, that such covenant on his part, was not the whole consideration for that on the part of Hodges. For ought that appear, the original sale to Hodges, many have been subject to all incumbrances, and this covenant the result of a subsequent agreement on the part of Holeman, to remove them; or this may have been only part of the purchase money, which, by agreement, was to be withheld until the incumbrances were removed. The obligation and its endorsement constitute but one agreement, and, when so considered, are the same in substance, as a promise from A. for value received, to pay B. so much, provided B. first does such an act, and to that description of agreement, the rule referred to, has no application.

It is further objected, that the plea does not distinctly shew, that the balance against Holeman, occurred in consequence of his withdrawals previous to the dissolution, and for those made afterwards, it is denied that the lien exists. We do not so understand the law. It is wholly immaterial when the balance against one, and in favor of the other partner, occurred, before final settlement, whether before or after dissolution. It is even said, that notwithstanding the dissolution, the partnership still subsists for many purposes, until final settlement. *Gow*, 286.

The demurrer to the tenth plea should have been overruled.

It was irregular to render judgment in paper, without such endorsement as the statute requires, of the willingness of the plaintiff to receive paper.

Judgment reversed, with costs, and cause remanded, for further proceedings consistent herewith.

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The lien of a partner on the partnership effects, for a balance due him on the partnership accounts, is not limited to the balance accrued at the time of the dissolution, but is co-extensive with the transactions on the joint account.

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CHANCERY.

**Talbot &c. against Sebree's Heirs &c.**

[Mr. Talbot for Plaintiff: Mr. Haggin and Mr. Sanders for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

April 8.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Affirmation, in an answer, that defendant does not '*recollect*' having done an act, is not tantamount to a direct and unequivocal denial, nor to a declaration that he does not believe he did it.

An authority to sign the name of a party to a title bond, may be presumed, (in a court of equity) from his knowledge of, and acquiescence in, the sale—when the denial of the answer is not wholly unequivocal.

Use of a lot, and interest on the price, held to balance each other, upon a rescission of a contract of sale.

TALBOT's affirmation, that he did not "*recollect*" that he had authorized any person to sign his name to the covenant for a title, is not tantamount to a direct and unqualified denial of authority, or even to a declaration that he did not believe that he had given such authority. He does not deny the allegation that he authorized Bryan to sell the lot; and it seems that he knew of the sale, and acquiesced in it. Wherefore positive proof of authority to subscribe his name, was not indispensable.

The bond itself and other circumstances are at least *prima facie* evidence of the actual payment of the consideration.

But under all the circumstances, and more especially as the use of the lot should, in the absence of proof to the contrary, be deemed, in equity, equivalent to that of the price, interest should not have been decreed on the rescission of the contract. And we are of the opinion, also, that restitution of the possession of the lot ought to have been directed on the payment of the consideration—(two hundred and twenty dollars.) For these errors—and we perceive no others—the decree of the circuit court must be reversed, and the cause remanded for a new decree consistent herewith:—that is, (as to the consideration,) for two hundred and twenty dollars, without interest.

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{Messrs. Wickliffe and Wooley for Appellant : Mr. Haggin for Appellee.}

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 8.

THIS is an action of ejectment, instituted by Logan against Moore, to recover from the latter a part of McNitt's preemption in Fayette county. Logan, the lessor of the plaintiff, derives title from his father, David Logan; the nature of whose title is fully explained by the decision of this court, rendered in the case of *McNitt vs. Logan*, reported in *Lit. Sel. Ca.* 60. By that opinion, David Logan was required to surrender to McNitt. The general court, in pursuance thereof, decreed that David Logan should convey by deed, "with warranty against himself and those claiming under him." David Logan prosecuted a writ of error, with a view to reverse this decree. But it was affirmed by this court, as may be seen by the report of the case in *Lit. Sel. Ca.* 119. In 1816, the general court appointed a commissioner to execute a deed in pursuance to the decree, David Logan having failed to convey in person.

History of the  
controversy.

The present lessor and plaintiff in error claims the land in controversy, under one or more deeds executed to him by his father, David Logan, prior to the institution of the suit by McNitt against D. Logan, if the dates of the deeds are not false.

Upon the success of McNitt in the general court, James Logan, the plaintiff in error, was turned out of possession, in virtue of a writ of *habere facias*, which issued against David Logan. James moved to set aside the sheriff's return, and to have restitution. In this he failed, as may be seen by a decision of this court in 3 *Bibb*, 530. He then instituted an action of ejectment, and recovered against Steele's heirs, who were made defendants. The history of this suit may be learnt from a decision of this court, in 3 *Marshall*, 394. The heirs of Steele enjoined the judgment in ejectment; but James Logan fi-

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nally prevailed, as may be seen by a decision of this court, reported in 4 *Monroe*, 430.

The decision of the cases referred to, will shew every fact necessary to a correct understanding of this protracted litigation, so far as the titles of the parties are concerned.

Moore, the defendant, claims under Steele's heirs.

Evidence in this  
case.

The defendant gave in evidence a deed from John Bradford to David Logan, for one hundred ninety nine and a half acres of land, and proved the value thereof to be about twenty dollars per acre. It was proved, that David Logan died seized of said land; and that he left as his heirs, five living children (among whom was the plaintiff.) and a grand child. It was proved, that the land in contest was worth about twenty dollars per acre; but what quantity was in contest, the record does not shew. Nor does the bill of exceptions purport to certify all the evidence given on the trial.

Instructions.

The court, in substance, instructed the jury, that if the land left by David Logan was of equal or greater value than the land in contest, then James Logan was barred in this action, notwithstanding *his* distributable share of the land descended was of less value than the land in contest; that the warranty, in the commissioner's deed to Bernard McNitt, descended upon all David Logan's heirs, and that if the entire land descended to all the heirs was of equal or greater value than the land in contest, James Logan was barred by the warranty contained in the deed. The correctness, or incorrectness, of this instruction will decide the cause as now; resented.

The warranty of the ancestor—lineal, collateral, or commencing by disseizin—binds the heir (in Kentucky) to the extent of the value of the lands to him descended: no further.

And the action of the heir will be barred for so much of the land held

The correctness of the instruction can only be maintained upon the doctrines of the law relative to warranty—of which, according to Littleton, there are three kinds, to wit: lineal, collateral, and that which commences by disseizin. Before the statute of Gloucester, lineal and collateral warranties which descended upon the heir, constituted a bar to his recovery of the land warranted, whether he had assets by descent from the warranting ancestor or not. Warranties which commenced by disseizin had not that affect. *Littleton*, S. 697.

In England, the common law doctrine of warranty

has undergone various modifications by statute. See 2 *Blackstone's Com.* 302-3.

Our parent state, as far back as 1785, passed an act upon the subject, of which our statute of 1798, 1 *Dig.* 78, is a substantial, if not literal copy. According to Judge Tucker, in his comments, the effect of the Virginia act seems to be, that all warranties are void in regard to the heir, unless he have assets to some extent from the warranting ancestor. If the heir have assets to any extent, the warranty is binding upon him to that extent. See note 8th to *Tucker's Blackstone*, 2 vol. 303. If the heir have assets by descent, he is bound by the warranty of his ancestor, although it commenced by disseizin. Such is the effect of the second section of the statute.

If, then, James Logan had assets by descent from his ancestor, David Logan, of equal value with the tenement sued for, the warranty constituted a bar. If he had assets to some extent, but not of equal value with the tenement sued for, then the warranty would restrict his recovery in the proportion that the value of the assets descended bears to the value of the tenement.

The court, in its instruction, held James Logan accountable for the value of the whole one hundred ninety nine and a half acres of land, of which his ancestor died seized, when his portion, as a coparcener, amounted to one sixth part only. This we think erroneous. The object of the various statutory amendments of the common law was two fold. First : to prevent the ancestor from depriving the heir of his inheritance without transmitting to him an equivalent ; and, second, to secure to purchasers their possessions, where the heir had in his own hands an indemnity for the loss sustained in consequence of the warranty. James Logan has no such indemnity in his hands. He can only claim, as a coparcener, one sixth part of the estate descended. He does not claim the tenement sued for, as heir, but as a purchaser from his ancestor. If all the heirs were lessors in the action of ejectment, and the recovery was for their joint benefit, then, the warranty descending upon all, and the estate descending upon all being of equal value to that sued for, the instruction would have been correct.

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under the warranty of his ancestor, as is equal in value to that which he took by descent—and no further.

Parcener is not bound by the warranty of his ancestor beyond the value of his own share.

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But, if James Logan is barred, he may be unable to obtain an indemnity from his co-heirs, and thus he would be visited with loss, contrary to the obvious intent of the statutes amendatory of the common law.

It does not appear in what character Moore, the defendant, held under Steele's heirs. He may be tenant from year to year, tenant under an executory contract for purchase, or he may hold in his own right, under an executed conveyance. Nor does it appear at what time he derived his interest or title from the Steeles. We are not disposed to enter into presumptions upon the subject, and shall, therefore, leave the other points relied on, open, and not concluded either way.

A covenant of warranty, in a deed made by a commissioner, in pursuance of a decree, binds the (constituent) grantor, and his heirs, as effectually as his own proper deed.

It may be proper to remark, that we regard the deed made by the commissioner, on behalf of David Logan, in pursuance of the 1st section of the act of 1808, 1 Dig. 322, just as obligatory upon his heirs, in respect to the warranty which it contains, as if it had been executed by him in proper person. The object of that act was to provide for an effectual execution of the decree of the court, where the defendants were obstinate, or could not be reached by compulsory process. This object cannot be attained without allowing the commissioner to insert in the deed all such covenants as the decree requires.

Judgment reversed, with costs, and cause remanded for proceedings not inconsistent herewith.

EJECTMENT.

*Doe, ex dem. Ball vs. Lively.*

[Mr. Crittenden for Appellants : Mr. Haggin for Appellee.]

FROM THE CIRCUIT COURT FOR BRACKEN COUNTY.

*April 8.*

Judge UNDERWOOD delivered the Opinion of the Court.

Case of interfering land claims. — Statement of the various titles and interferences.

THIS controversy grows out of interfering land claims.

In April, 1792, a patent, for five thousand acres of land, issued in behalf of Payne and Morgan.

In November, 1801, a patent issued to Daniel Curd, for eight hundred acres of land.



In June, 1800, a patent issued to Thomas, Robert, Samuel, Margaret and Willouby Young, heirs of Robert Young, deceased, for one thousand acres of land.

The tract of Payne and Morgan covered the whole of the other two tracts. The tract of Curd interfered with that of the Youngs, to the extent of about four hundred acres. All the surveys were bounded on one side by the Ohio river.

It seems that the tract of Young was divided, by allotting to Thomas two hundred acres off the upper end; to Robert, who had purchased Samuel's interest, four hundred acres adjoining Thomas; to Margaret, who married Littleton Cook, two hundred acres adjoining Robert, and to Willouby, two hundred acres, off the lower end.

The lots of Thomas and Robert did not interfere with the survey of Curd.

In October, 1825, Margaret Cook, her husband being then dead, conveyed her two hundred acres to Lively, and in April, 1827, Thomas, Robert and Willouby Young (Samuel being dead,) conveyed their interest in the same two hundred acres of land to Lively; and in their deed they state that Littleton Cook and his wife had conveyed the same land to Lively, by deed, dated 1st of February, 1815; but at that time a legal division of the claim of Young had not been made.

By the deeds of 1825 and 1827, Lively certainly obtained all the title which the patentees could part with, under the grant to the Youngs. As the deed made by Cook and wife, in 1815, is not exhibited, we cannot tell whether it is good for any purpose. It may not have passed Mrs. Cook's title.

In September, 1814, Curd conveyed the land granted to him, to Ball. In March, 1822, Payne and Morgan conveyed to Ball so much of their tract as covered Curd's patent. On the 16th of July, 1824, John Morgan, as executor of the will of Charles Morgan, the copatentee with Payne, conveyed twenty three acres, lying on the outside of Curd's patent, and within the limits of Young's patent, to Ball. These twenty three acres, it appears from the connected plat, constitute the

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The act providing, "that not more than two new trials shall be granted to the same party in the same cause" does not so operate as to prevent the court of appeals from re-examining the questions of law reversing, and remanding the cause for a new trial, after three or more verdicts for the same party.

Settlement and continued possession relied on by defendant.

whole of the land claimed by Lively, not covered by Curd's patent.

In October, 1827, Ball commenced this action of ejectment against Lively. The latter obtained two verdicts in his favor, both of which were set aside, and new trials awarded. The jury found a third verdict in favor of Lively, and Ball has appealed to this court.

The first point presented, is, whether a fourth trial can be ordered by the court, if upon investigation, it should be found that the circuit court erred in deciding any question of law upon the last trial. The act of 1796, regulating civil proceedings, declares that "not more than two new trials shall be granted to the same party in the same cause." The object of this act was to give to the trial by jury ultimate validity, even in opposition to the opinion of the court, and at the same time, to give the judges a limited control over the verdicts of juries, and thus enable the court to correct their errors, by granting opportunities for revising the verdict. If, however, after two new trials, a third jury should find in the same way, that verdict was to be final. The intent of the statute was to guard against the passions, the prejudices, the excitements and errors of jurors, and yet to secure their independence; but it was never designed to consecrate the errors of the court, and to place them beyond the supervisory control of the appellate tribunal. So this court has heretofore decided. *Burton vs. Brashear*, 3 *Marshall*, 278.

We shall proceed to examine the merits of the controversy.

It is very clear that the paramount title was with the appellant, and that he ought to have succeeded, unless some one or more of the grounds assumed in the defence should have prevailed.

The appellee relied mainly upon an adverse and continual possession, by actual settlement and residence upon the land, for more than seven years previous to the institution of the suit against him. The limitation of twenty years was also relied on.

The facts seem to be these. Robert Young settled, in March, 1806, upon the tract patented to him and his

brothers and sisters, but on the out side of Curd's patent lines. The possession seems to have been continued from this time. There was no division among Young's heirs previous to the settlement thus made by Robert. In 1814, the two hundred acres claimed by Lively, were laid off for Littleton Cook, in right of his wife; but previous to that time no lines and corners had been made for any one of the heirs, although it was understood among them how the tract should be divided. In March, 1815, Lively settled upon the two hundred acres, laid off for Cook, within Curd's patent boundary, and continued his residence thereon up to the commencement of this suit, in October, 1827.

With a view to destroy the effect of the statute of limitation operating upon the above facts, the appellant gave in evidence the record of an action of ejectment, instituted by Morgan's lessee, against Lively and others, in December, 1815, in which the plaintiff recovered a judgment for an undivided moiety of so much of the improved land as Lively had in actual occupancy, within the boundary of the patent of Payne and Morgan and without the boundary of a patent in the name of William Roberts. This judgment was rendered in July, 1818. The appellant also gave in evidence transcripts of the records of two *scire facias* cases against Lively. In one of these cases it appears, that the court, in April, 1825, gave judgment for execution, in favor of John Doe, on the demise of John Morgan, executor of Charles Morgan, against Lively, for his term yet to come, of and in an undivided moiety of so much of the improved land as Lively had in actual occupancy, within the boundary of the patent of Payne and Morgan, and without the boundary of the patent to William Roberts. In the other case, it appears that the court, at the same term, gave judgment for execution, in favor of John Doe, on the demise of Henry Payne, against Lively, for his term yet to come, of and in two thousand five hundred acres of land. Writs of *habere facias* issued in pursuance of the judgments in the *scire facias* cases, on the 24th of August, 1825; and on the next day, the sheriff, in pursuance of these writs, delivered possession to Ball,

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Facts relied on by plaintiffs, to counteract the effect of continued possession in defendant.

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by order of the attorney of the lessors. On the day that Lively was turned out by the sheriff, he and Ball entered into a written agreement, in which it is recited, that Henry Payne and Charles Morgan, respectively recovered on their demises in three actions of ejectment, each an undivided moiety of five thousand acres of land in Campbell county, on the Ohio river, against said Lively and others; that judgment had been revived by *scire facias*; that Ball had purchased of Payne and the representatives of Morgan, the land in Lively's possession, and that writs of possession had been issued, and possession delivered to Ball; whereupon in consideration of the friendship between the parties, and one dollar, Ball leases the premises in Lively's possession to him, until the 10th day of the ensuing March, on which day Lively agreed to surrender the possession to Ball, and pay the dollar.

It was proved that Curd took possession of the tract patented to him, and which was surveyed, in April, 1785, by tenant, in 1796, on the outside of the tract patented to the Youngs; that, in 1797, the tenant built a cabin within Young's boundary--both Curd and the tenant for Curd intending to hold possession of Curd's entire survey; that the cabin so built was never inhabited, that Curd's possession by his tenants continued up to 1814, or 15, when he sold, and delivered possession, to Ball, who has continued in possession, actually residing on the land, ever since. Ball's dwelling house is outside the lines of Young's survey; but, in 1818, Ball extended his improvements over the line of Young, into his tract.

We are of opinion that Lively has connected himself with the title of the Youngs, in such manner as to authorize him to rely on his settlement and residence for seven years, in bar of the appellant's action, unless this defence is overruled by something in avoidance.

The matter relied on in avoidance, grows out of the eviction of Lively and his contract thereafter to hold as Ball's tenant. If the eviction and contract be the result of fraud on the part of Ball, we readily concede, that they should have no effect upon the controversy. They seem to have been regarded in that light in the case of

Circumstances the result of fraud, should have no effect upon a controversy. But, the vendee of a party who has obtained a judgment of eviction, may enforce the judgment (by *sci. fa. &c.*) without fraud.

forcible detainer between the parties, reported in 2 *J. J. Marshall*, 181. It is proper, however, to observe, that the evidence in that case, and in the present, is different. It now appears that Morgan and Payne obtained their judgments in ejectment against Lively, previous to 1822. They conveyed to Ball in that year. Having transferred their title to him, we perceive no reason why he might not properly proceed, in their names, to revive the judgments, in order to obtain possession of the land he had purchased. The vendee may take steps to enforce a judgment in favor of his vendor, and which by the purchase inures to his benefit, without being guilty of fraud.

As to the errors or irregularities in the *scire facias* cases, if there be any, we cannot correct them, or regard them, until regularly brought up for revision. They are not before us for correction now.

If Ball, without fraud, proceeded to enforce the judgments in favor of his vendors, it follows that he could, lawfully and without fraud, lease the land to Lively, either before or after the sheriff delivered possession under the writs of *habere facias*. It was certainly competent for Lively, after judgment of eviction against him, voluntarily to acknowledge the better right, and accept a lease, without waiting until he was actually turned out by *habere facias*. After the execution of the *habere facias*, and the delivery of possession to Ball, the acceptance of a lease, would bring Lively into possession as Ball's tenant, so that he would be estopped to deny Ball's title, provided no fraud was practised to induce Lively to take the lease. If Ball, by fraudulent means, induced Lively to accept a lease, and become his tenant of land which had not been recovered in the actions of ejectment, the lease and tenancy, being the work of fraud, might be disregarded. But even then, if Lively had been turned out of possession by process upon the judgments in ejectment, and the possession delivered to Ball, he would have a right to recover in this action, all the land which had been legally delivered to him by the sheriff, under the writs of *habere facias*.

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After a judgment of eviction, the plaintiff, or his vendee, before or after the delivery of possession — may make a lease of the premises, which the tenant may accept, and thus change his tenure from adverse to amicable, and be precluded from disputing the title of his lessor.

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If the sheriff, in executing a *habere facias*, deliver more land than the judgment is for, the delivery is good to the extent of the recovery,—and void for the surplus.

The possession delivered under a *habere facias*, has relation back to the commencement of the suit, and altho' the holding of the tenant *du ring the time between service of the declaration and notice, and execution of the habere facias*, was adverse to the plaintiff, that period cannot be included in the time relied on to bar the pl'tf (or those claiming under him) in any subsequent contest for the land.

The sheriff could not legally deliver to Ball more land than his vendors had recovered by their judgments. But to that extent, when the possession was transferred to Ball, by legal process, it had effect by relation to the commencement of the actions of ejectment, so as to conclude Lively, and prevent him from taking into computation, the time running between the service of the declaration and notice, and the execution of the *habere facias*, in support of his defence under the statutes of limitation.

Without attending to the effect produced on the possession of Lively, by the prosecution of the ejectments against him to judgment, and the execution of the writs of *habere facias*, the court instructed the jury, "that if they believed the defendant and those under whom he claimed, had had seven years continued adverse possession of the land in controversy, by actual settlement thereon, under an interfering entry, survey or patent, adverse to the claim of the plaintiff's lessor, under a connected title, in law or equity, deducible of record from the Commonwealth, prior to the commencement of this suit, the law was for the defendant." This instruction, applied to the evidence before the jury, was erroneous. In deciding upon the defence resulting from the statutes of limitations, it did not allow the jury to disregard the time running between the commencement of the ejectments, and the execution of the writs of *habere facias*. Lively's possession, during that period, was not amicable, but adverse. The jury would, therefore, understand the instruction as a peremptory direction to find for the defendant, when they might have found otherwise, had they been told that the legal effect of the judgments in ejectment and carrying them into execution was such as to exclude the time between the commencement of the actions and the delivery of possession under the writs of *habere facias* from the computation. For this cause the judgment must be reversed.

Where the junior grantee extends his improvement over the line of the elder grantee in

In 1818, Ball extended his improvement into Young's patent. In 1822, Ball purchased from Morgan and Payne. It may be proper to decide the effect of this extension of the improvement in 1818. At that time

Ball held under Curd's patent only, and as Lively was then in the actual possession of the two hundred acres allotted to Mrs. Cook, claiming to the extent of its boundaries, under the elder grant, extending the improvement over the line of Lively, did no more than give to Ball possession in fact of so much ground as he enclosed over the line. His purchase, in 1822, from Payne and Morgan, did not enlarge his possession within Lively's boundaries, because Lively, at that time, would have been completely protected by the limitation of seven years, but for the proceedings in the actions of ejectment previously instituted. These proceedings cannot be coupled with the extension of the improvement in 1818, so as to make them assist each other. They can only have such validity as they are separately entitled to.

It has been insisted that we ought not to regard the action of ejectment instituted by Payne, because there is no evidence of it, except that furnished by the record in the *scire facias* case. We think the objection untenable, because that record was admitted without objection, and no exception taken for want of the original record.

As to the deed of 1824, under which Ball claims twenty three acres, it is sufficient to remark, that it was executed after the act of January 7th, 1824, concerning championship and maintenance took effect, and that if Lively was in the adverse possession of the land at the time of the execution of the deed, it was void.

Judgment reversed, with costs, and cause remanded for a new trial.

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possession, and afterwards acquires a third title paramount to both, the possession under the new title, will not be deemed to extend over the whole claim, but will be restricted to the enclosure.

Bringing an ejectment, and enclosing part of the land—independent acts, cannot aid each other.

Record of *scire facias*, admitted, without objection, in the court below, as proof of the original judgment, will be allowed the like effect here.

A deed of land, in the possession of an adversary claimant, made since 1st July, 1824, is void.

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Allin, Executor of William Shadburne,  
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Thomas Shadburne's Executor and Heirs.

[Mr. Monroe for Plaintiff : Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR NELSON COUNTY.

April 9. The Judges in this Case delivered separate Opinions.

Suit on a bond :  
peculiar character  
of the bond.

CHIEF JUSTICE ROBERTSON :—The appellee, (James Allin,) as surviving executor of William Shadburne, deceased, sued the appellants, as the executors and heirs of Thomas Shadburne, deceased, in debt, upon a bond executed to the said Allin and another, as executors of William Shadburne, by Thomas Shadburne and James Allin. The declaration contains two counts ; the first describes the bond as an obligation by Thomas Shadburne only ; the second describes it as an obligation signed by Thomas Shadburne and James Allin. The bond, as exhibited upon oyer, purports to have been signed by both Thomas Shadburne and James Allin.

Pleadings : judgment, for defendant, and writ of error.

The appellees demurred to the declaration, and filed a plea in bar, averring that *James Allin the obligor, and James Allin the obligee, were but one and the same person.*

The circuit court overruled the demurrer to the declaration ; and, having also overruled a demurrer to the plea, rendered judgment against the appellant ; to reverse which, this appeal is prosecuted.

A suit may be maintained, against a single obligor, upon a writing purporting to be the joint bond of the defendant and another ; and a count which describes the writing simply as the bond

We cannot perceive any ground for demurring to the declaration, unless the appellants (erroneously) supposed that the first count was defective because it described a bond with two signatures as the obligation of only one person ; and that the second count was not good, because it averred that "James Allin" was one of the obligors. But neither of these objections can have any influence. There is no necessary discrepancy between the bond as declared on, and as exhibited ; the simple fact that the



name of James Allin appeared to be subscribed, does not shew that he is an obligor, and cannot be available on demurrer. Nor is it a legal deduction, from the identity of names in the second count, that "*James Allin*" the obligor, is "*James Allin*" the obligee. Wherefore, as the declaration appears, in all respects, to be substantially good, the demurrer to it was properly overruled.

The plea cannot be aided by the familiar doctrine as to "*confusion of parties*;" because the same person was not both plaintiff and defendant. Nor can it be sustained on the ground of a release of the cause of action, by operation of law.

When a legal cause of action, *once subsisting*, has been suspended by the voluntary act of the party who was entitled to it, it is, in most cases, considered as released *by law*. Thus, if the obligee marry the obligor, and thereby suspend the cause of action, the law deems the marriage a release of the legal obligation. So, if a creditor make one of several joint debtors, or joint and several debtors, his executor and the executor qualify as such, the whole legal obligation is thereby extinguished; for, as an executor cannot *sue* himself, the creditor, by appointing one of his debtors his executor, voluntarily suspends, and thereby, in contemplation of law, releases the cause of action as to such debtor; and a release to one operates as a release to all.

Consequently, if the bond, in this case, had been given to the testator, (William Shadburne,) the subsequent appointment of one of the obligors to be his executor would, by operation of law, have released both of the obligors from their prior legal liability. But, James Allin could not make a contract with himself. The *aggregation*, indispensable to the making of a contract, forbids the idea of an agreement between James Allin in his individual, and the same James Allin in his fiducial character. As to him, therefore, there never was any legal cause of action, because there never was any contract imposing on him any legal liability. And consequently, as to him, there was nothing to release; and, surely, the fact that he was never bound, could not have

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of the defendant, or a count which describes it as being signed by another, as well as the defendant, will be sufficient.

That obligor & obligee are the same person, is not a legal deduction from the identity of the names.

Voluntary acts of an obligee, which suspend his right of action: as his marriage with the obligor, appointment of his debtor, who accepts the office, executor, &c.—do, in general, release the cause of action, to such debtors—and their *co-obligors*, also; for a release to one is a release to all.

If two persons make a joint obligation, *payable to one of themselves*, it is void as to the latter, and is, in effect, the sole obligation of the other—against whom the obligee (though his own name is to the bond as a co-obligor) may maintain his action at law, for the whole sum.

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operated as a *release* of the obligation of Thomas Shadburne.

If, therefore, the plea can be sustained, it must be only because the *entire* contract was a nullity, in consequence of its invalidity as to Allin as a co-obligor. But can such a position be maintained by either authority, principle or analogy? We think not. We have seen no direct authority upon this point, unless it can be found in *Debard et al. vs. Crow*. [Manuscript decision—Fall Term, 1831.] In that case, this court expressed the opinion, that the legal liability of a principal obligor, in a joint and several obligation, was not affected by the fact that his surety was one of the *obligees*; but that, in such a case, the obligation was that of the principal only. There would be no difference between that case and this, if the bond in the latter had been joint and several, instead of being, as it is, joint, and if, also, it had shewn on its face that Allin was only a surety. But these discrepancies in the characters of the two cases, are not so essential as to subject them to the operation of different principles. The same principle must, in our opinion, govern both cases.

If a principal obligor in a joint and several obligation could not bar an action against himself alone, by pleading that another person, who subscribed the bond as his surety, was *obligee*, and therefore not bound as a *co-obligor*, why should a principal in a joint bond, bar a suit against himself alone, by a similar plea? In each case the bond would, according to its legal effect, be the obligation of the defendant only: and that is the reason why he could not avoid it by pleading that another person, who had signed it, as his surety, was not bound in law. The reason why the surety is not bound is not material to his principal, to whom the same reason does not apply. Infancy, coverture, duress, or the fact that the obligee and surety are identical, and therefore cannot make a contract, would each be legal cause for exonerating the surety; but they are all personal, and no one of them would affect the principal obligor, to whom none of them applied.

In a joint obligation, as well as in a joint and several obligation, each obligor, who is bound at all, is legally liable, in *solido*, for the whole undertaking. A party to a contract, who was free from personal disability and fraud, and who, for a binding consideration, freely agreed to be bound, should not be exonerated merely because another person, who had no legal capacity to bind himself, had, in form, been associated with him as an apparent co-obligor. Allin could not make a contract with himself only because he and himself are not two persons—his incapacity was personal, and did not apply to Shadburne. Allin on one side, and himself and Shadburne on the other, were in fact and in law, only Shadburne as one party, and Allin as the other party to the contract. Two minds only were engaged, and only those two consented. Why is not the contract legal and binding? And why is it not the sole obligation of Shadburne, just as it would have been if a *feme covert*, idiot, or slave, had signed with Shadburne, as a co-obligor? Even if he and Allin jointly owed the consideration of the bond, the legal effect of the undertaking seems to be that he is bound for the whole amount. It is *his* obligation, entered into freely, and for a legal and valuable consideration; and the fact that the obligor *justly* owes one half cannot extinguish the obligation, or alter its *legal* effect, as a sole liability for the whole.

In such case, the sole *legal* liability would be coextensive with the entire undertaking, and even a plea to the consideration would be unavailing at law. But a judgment for the whole amount of the bond might be enjoined in equity, and the obligor exonerated, by decree, from paying to the obligee more than his part of the consideration, or original debt, for which he was justly responsible prior to the execution of the bond.

But the bond itself could not be *void*; and, therefore, must impose a *legal* obligation on the sole obligor for its whole amount. Whether the consideration be joint or several, partial or commensurable, cannot be essential to the *legal* character and effect of the obligation. It must be either totally void, or a sole liability for the whole amount. We cannot perceive any reason why it should

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In joint (as in joint and several) obligations, each obligor is responsible for the whole undertaking.

If two persons jointly owe a debt, and both sign a bond for it, payable to one of themselves, he who is alone liable at law, upon such bond, to his co-obligor, the obligee, might be relieved, in equity, from the payment of all above his just portion of the debt.

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Every person capable, in law, of contracting, is presumed to understand the legal effect of his contract.

be void. There was a competent obligor and a competent obligee. There is no question of fraud, or duress, or of a want of consideration. Allin was never bound as an obligor, because he had no legal capacity to bind himself. Shadburne had such a capacity, and agreed to be bound. He must be presumed to have known that Allin would incur no legal liability, (if such be the law,) because every person of legal capacity to make a contract, is presumed to know the legal character and effect of that contract. He should be presumed, therefore, to know when he signed the bond, that Allin incurred no legal responsibility as a co-obligor, and that consequently the bond would be binding on himself alone. Knowing, or being presumed to have known, these things, he cannot be permitted to object to a suit on the bond according to its legal effect, and according to his presumed understanding of it when he signed it.

The same person cannot be both obligor and obligee, nor plaintiff and defendant.

In *Thomas vs. Thomas*, 3 Lit. 8—*Sanders' Heirs vs. Sanders' Executors*, 2 Ib. 321—*Allen vs. Gray*, 1 Mon. 98—and *Lyle vs. Gatewood*, 5 Ib. 6—this court decided only that the same person could not be both obligor and obligee, and could not be both plaintiff and defendant in the same action. But not only is there no intimation in any of those cases, that such a bond as that which we are considering would be void, but there is an implied admission in all of them, that it would be binding on an obligor who is not also an obligee, and that a suit at law could be maintained on it against those, but those only, who may be bound. If such had not been the opinion of the court, it is reasonable to presume that, instead of arguing to prove that in consequence of a confusion of parties to the action, it could not be maintained, the court would, at once, have said that the bond was void altogether, and, therefore, that no suit at law could be maintained upon it.

In *Allen et al. vs. Gray et al.* (*supra*.) Paul Skidmore and others had signed a bond to Paul Skidmore and other different persons. The suit was brought in the names of all the obligees, against Paul Skidmore and others; and the counsel for the plaintiffs having endeavored to shew that, as the suit had been abated as to Skidmore,

the action could be maintained, this court said :—"It is true the replication of the plaintiffs, to which the defendants demurred, and which was adjudged insufficient by the court below, alleges, that after the action was commenced, and before the defendants appeared and pleaded, *Skidmore* departed this life, and the action as to him was abated ; but if the principle of law be as we have supposed, (*that is, that Skidmore could not be both plaintiff and defendant.*) the action was irregularly commenced, and being erroneous in its origin, the error cannot have been cured by the subsequent abatement." Here is an obvious admission, tacitly and virtually, that if the suit had not been originally brought against *Skidmore*, it might have been maintained. But in *Debard et al. vs. Crow*, that point has been directly so decided ; and we have not been able to find a single authority or even dictum to the contrary. And consequently, as principle and analogy seem to sustain the doctrine ruled in *Debard et al. vs. Crow*, we have no disposition to overrule or unsettle it.

In this case, if, as is probable, *Allin* signed the bond as surety only, then the case would stand thus : as an executor was willing to be the surety of a debtor to the testator's estate, or, in other words, was willing to dispense with security, therefore, and therefore only, the debtor insists that his own bond is void ; that is, that it cannot be enforced against him, because he gave no security, or because his surety was not bound, in consequence of personal or legal incapacity to bind himself.

But whether *Allin* signed the bond as surety, or as a co-principal, is not essential. In either event, *Thomas Shadburne* was sole obligor, and the bond has, as to him, precisely the same legal efficacy as it would have had if *Allin* had never signed it.

This conclusion appears to accord with principle, analogy, authority and justice ; all of which seem to oppose the opposite doctrine.

There is no confusion of parties ; there has been no release, by operation of law, of any preexisting legal liability ; the bond, according to its legal effect, was, *ab origine*, a sole and legally binding contract, by *Thomas Shadburne*, to pay the whole amount ; it imposed no le-

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gal obligation on Allin; the suit is brought upon the bond, as the sole obligation of Shadburne; and, consequently, the circuit court erred in overruling the demurrer to the plea.

Wherefore, it is the opinion of this court, (Judge Nicholas dissenting,) that the judgment of the circuit court be reversed, and the cause remanded, with instructions to sustain the demurrer to the plea.

JUDGE NICHOLAS—*dissenting*:—This case may, in effect and substance, be fairly and briefly stated thus:—Thomas Shadburne and James Allin executed a joint obligation to said Allin, for the payment of money, who now seeks a recovery of the whole amount from Shadburne, by an action on the bond. There is nothing to shew, that one was principal and the other surety, or to destroy the necessary, usual and legal inference from all joint contracts, that they mutually and equally participated in the benefit of whatever it was, that constituted the consideration of the obligation—even if such matter, had it been shewn, could have any influence in the determination of the question of Shadburne's liability, which it is not conceded that it could. That Allin cannot have a right to maintain an action on this obligation, against Shadburne, strikes my mind with the force of a self-evident proposition; but, like most other propositions of that sort, it may be very difficult to prove it, to another mind, by deduction from any regular chain of reasoning. His right to maintain the action, is admitted to be unsustained by any precedent, except that of *Debard vs. Crow*, which is still in the power of those who made it, to revoke as an authority. The cases referred to of *Allen vs. Gray*—*Sanders vs. Sanders, &c.* will be found, on examination, to have no bearing whatever upon this, and not to contain the slightest intimation in favor of the right to recover here. The case must have often occurred, from the awkward efforts of ignorant men to reduce their agreements to writing; and as the books furnish no trace of any adjudication, or even *dictum*, recognising the right to maintain such action, it is very persuasive evidence of the non-existence of such right. I cannot

perceive how it is to be maintained upon any established legal principle, or any of those analogies, upon which it is attempted to be based.

It is attempted to be likened to cases of joint contract, where one of the contractors is a married woman, a lunatic, or an infant. But the resemblance is not discerned, nor can it be admitted. In those cases the sole liability of the other joint contractor is allowed on the ground, that, as to the *feme*, the lunatic, or the infant, it was void, or voidable, from a want of capacity to make an obligatory contract. Here there is no natural or legal incapacity on the part of Allin to contract, but merely the incapacity, common to all, of contracting with himself. Can he, laboring under no disability to contract, after having induced another to enter into a joint contract with him to himself, be permitted to allege his own disability to contract with himself, as a ground of exemption from his share of the obligation, and thereby cast its whole burthen upon the other, as if it had been the sole contract and separate liability of that other? Reason and justice will promptly answer no. I think their response, is the response of the law also. If he can be permitted so to do, it is a solitary and anomalous instance, where the law fails to estop a man by his own free and voluntary act.

The legal, as well as natural presumption from this, like all other joint contracts, being that the co-obligors were joint and equal participants in the benefit which induced the giving of the joint obligation, Allin can, in justice, recover from Shadburne, no more than a moiety of the obligation. But if it be sustained as a valid obligation against Shadburne, upon which Allin can recover any thing, he must be permitted to recover the whole. How then is Shadburne to be relieved from the injustice of being compelled to pay Allin that moiety of the debt which Shadburne does not owe, but which if it be due from any one, is due from Allin himself? There is no process known to the common law, by which he could be redressed. The recovery in this action must be forever final and conclusive between the parties, and after the collection of the money, in the course of this judi-

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cial proceeding, Shadburne would never be allowed to recoupe any part of it, in any other suit between them concerning it. It is needless to inquire, whether a court of chancery would interpose, and afford relief, in such case, for even if it be conceded that it would, that could by no means affect the question. The principles of the common law, as expounded in its own courts, are based exclusively upon its own mode and power of action in its own courts, without reference to the manner in which the matter might be treated of, or acted upon, in chancery. In looking to results, in order to ascertain the propriety of applying any principle of law so as to create a legal liability in a new case, those results depend, in the estimation of the law judge, exclusively upon the action of his own forum upon the subject. If the result so ascertained, operates manifest and irreparable injustice to one of the parties, that, of itself, conclusively shews, either that the supposed principle is unknown to the law, or that it is not properly applicable to the given case. So here the manifest and irreparable injustice of permitting Allin to recover from Shadburne, his, Allin's, own share of a joint liability, is an unanswerable argument, to prove, either that there is no legal principle such as is here contended for, or that it is not properly applicable to this case.

It is no fair answer to this view of the subject, to say, the contract created a liability upon Shadburne, though it created none upon Allin, and that, therefore, it is only making Shadburne shoulder his own several liability, and not the joint liability of himself and Allin. This is a mere begging the question—a mere assumption of the liability of Shadburne, which is itself the thing to be proved. The rational deduction from the circumstances, as presented to us, is, that Allin received a full share of the consideration upon which the obligation is based; and the true question is, whether the law, under those circumstances, will permit him to treat the obligation as a valid one against Shadburne, and recover its whole amount from him. The fair inference from the face of the contract, which is all that is given us to build even a conjecture upon, is, that Allin and Shadburne, by a



joint purchase, or otherwise, incurred a liability, which they supposed to be a joint one, to the executors of William Shadburne, and attempted to evidence that liability in an obligatory form, by executing a joint note to the executors, though Allin himself was one of them. If this attempt to create a joint, legal liability, be pronounced idle and inefficacious for any purpose, they each stand severally responsible to the estate of William Shadburne, for their several portions of the debt, as if no such joint liability had been attempted to be created; and no injustice is done any where. But, if it be declared efficacious, so as to enable a recovery against Shadburne for the whole amount, it puts it in the power of Allin to wrong and defraud Shadburne, to the amount of one half the debt; or under the most favorable view that can possibly be taken, drives Shadburne to his action, to recover back from Allin, the amount which Allin will thus have wrongfully collected from him; which, in a very supposable case, that is of Allin's insolvency, by no means mitigates the hardship and injustice of the result. When such are the opposite results of these two modes of treating this contract, or attempt at a contract, it would seem to me, that neither law, reason, or justice, can hesitate in making the election between them.

But it is said, that Shadburne, being bound to know the law, must be presumed to have known that though Allin signed the note with him as a joint obligor, yet he was not bound thereby, and therefore he, Shadburne, understood that he was incurring, and was willing to incur, a sole, several, liability, for the whole debt. This argument, in addition to the objection that it contains an assumption of the thing to be proved, is liable to the further objection, that it is a false deduction from its own premises. For though Shadburne knew that Allin was not bound, it does not follow that he either knew that he would be, or was willing that he himself should be bound, for the whole debt. He might well reply, that he knew that they were both bound, or neither was, and if he had not known, the law would not permit Allin to turn it into a sole liability upon him, he never would

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have signed a note for the whole. Or he might retort this reasoning on Allin, and say, you knew that where two equally capable and willing to contract, do, for a mutual consideration, enter into a joint obligation, they are equally bound, and if, from any cause, it is legally inoperative as to one of us, it must be inefficacious as to the other also; and as you knew you could not contract with yourself, when you took our joint obligation to yourself, you knew it could have no legal effect, and therefore was willing it should not be obligatory on me. The one process of reasoning is as satisfactory and conclusive as the other, and equally well adapted to a rational result.

Strip the case of the immaterial circumstance of the contract being reduced to writing, and suppose it an attempt to create a joint parol agreement, for a consideration jointly received, to pay Allin, as executor, a sum of money. It will not be pretended by any one, that a recovery could be allowed against Shadburne, upon such agreement, for the whole amount. The law would pronounce such attempted, joint contract a nullity, and in lieu of it, would create an implied contract upon Shadburne, to pay his half only of the debt. The same result must follow the contract when clothed in the form of a written obligation. It can acquire no validity from the mere circumstance of its being in writing. The legal impossibility of a man's making an obligatory agreement for any purpose, by entering with another into a joint contract to himself, applies equally to either mode, and renders such attempt utterly abortive.

The impropriety of making this writing obligatory upon Shadburne, may probably be further and better illustrated by a few supposable cases:—A, B and C are desirous that something shall be done, or left undone by A, and to induce him thereto, B and C are each willing to incur a several responsibility of indemnity, to the extent of one-third the liability; but possessing no better information than Allin and Shadburne had, of the proper mode of drafting legal obligations, they enter into an agreement like this: "We, A, B and C, promise to indemnify A, &c." Could A, upon such a covenant, be

permitted to recover a full and entire indemnity from B and C?

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Or suppose the obligee in a bond, sign it with another, as joint sureties for the principal. In the event of the obligor's insolvency, could the obligee recover the whole amount from the other surety? Or suppose A and B enter into a joint obligation to the wife of A—could A, in the name of himself and wife, recover the whole from B?

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The ready response that must await each of these queries, from every intelligent mind, upon principles of mere abstract justice, is, in my opinion, the response of the law also; and equally forbids the recovery, by Allin, of the whole of this debt from Shadburne.

Suppose A, B and C, co-partners in trade; that A sells something to the firm, and receives from B the note of the firm for the payment of the purchase money. Could he recover in an action upon the note against B and C, or either of them? Certainly not against C, for B had no authority to bind C, as his partner, except by a contract which would be mutually and equally obligatory upon the whole firm. Could he then recover from B the whole amount, as upon his sole and separate obligation, after, by his acceptance of the note in that form, having recognized B's authority to use the name of the whole firm in that way? It surely cannot seriously be contended that he could. Then I ask for a discrimination to be drawn between that case and this. Every argument which is used to fasten a liability upon Shadburne, equally applies, and will as necessarily fix it upon B. Nor will it do to postpone the determination of that, or any such supposable case. In the adoption of any new principle, or in the application of any supposed old principle to a new class of cases, we must look diligently around, to see whither it is to lead us. If its destination is inevitable error, we are bound to pause and forbear its application. It is the duty of a judge, to be ever timid in the pursuit of any path where he can find no foot print of a predecessor. I like not the maze into which I think I see that we are to be led by

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adopting the principles of the opinion delivered by the court, and must, therefore, withhold my assent.

If some effect must, *per force*, be given to this contract, and Shadburne rendered liable upon it, much the most legal, as well as equitable, turn to give it, would be to treat Allin's co-executor as sole obligee, and allow a recovery by him, or his representatives, against Allin and Shadburne both. I by no means concede that this could be done, but suggest it as the better and much the most plausible mode of giving effect to the contract, so as to bind Shadburne.

JUDGE UNDERWOOD—*concurring with the Chief Justice* :—  
The principles which rule this case being questioned by Judge Nicholas, I am induced to state the grounds of my opinion. I shall do it in a few words.

"A contract is an agreement, upon sufficient consideration, to do or not to do, a particular thing" A man cannot pass a consideration from himself, to himself; and hence no man can make a contract with himself. The thing is impossible.

All persons who execute written contracts as obligors, must be regarded, if bound thereby, either as principals, or sureties. A man cannot, as principal, contract with himself, not only because he can pass no consideration to himself, upon which to base the contract, but likewise, because he is both morally and physically incapable of receiving from himself a payment of the debt contracted, and of coercing himself to perform by legal remedy. It is equally impracticable for a man to create an obligation to himself, as the surety for another. He cannot, by any device of the sort, make the debt due by the principal more safe. It is idle, therefore, to look upon a man as a surety to himself, for the debt which another owes him.

In this case, the question is, whether Shadburne is discharged from his written promise, because Allin signed the instrument as co-obligor to himself. Allin's signature could impose no obligation upon him, to himself, for the reasons stated. How can his signature vacate Shadburne's covenant? If a consideration passed from Allin

to Shadburne, then an essential ingredient to constitute a contract, exists as between them, and a promise or covenant founded thereon, ought, in justice, to be enforced. Why shall it be void if Allin performs the idle act of putting his signature to the instrument? If a stranger had forged his signature to the instrument, the forgery would not vitiate the contract, and exonerate Shadburne. Allin, by putting his name as an obligor, can no more make it a contract with himself, than if his name was forged. His signature, signed by himself or another, can neither benefit nor injure Shadburne. Wherefore then shall he be exonerated from the payment of the sum he has stipulated to pay, and for which, if he be principal, he has received an equivalent, according to legal presumption? If he received no consideration, if he merely executed the instrument as surety for Allin, who, being executor, might have supposed that he could, in his individual capacity, execute an obligation to himself as a fiduciary, then I think Shadburne is not bound. He might defend upon the ground, that there was no consideration: for if there be no consideration passing to the principal, none can pass to him who signs as surety merely. There is no debt which Shadburne can pay as surety for Allin, because Allin cannot owe himself.

Those who enter into obligations with infants, or *femes covert*, are bound by them, notwithstanding the infant co-obligor, or *feme covert*, is not; and yet the obligors who are bound may insist with truth, that they would not have entered into the contract at all, had they known that the infant, or *feme covert*, could escape contribution. Nonage and coverture are facts of which we may be ignorant. The law allows no one to be ignorant of the principle, that a man cannot contract with himself. Consequently, there is more reason to exonerate a man from his obligation, when an infant, or *feme covert*, unites with him in its execution, than there is when the obligee performs the idle act of signing as a co-obligor.

The effect of a note executed by a member of a firm, in the name of the firm, to a co-partner in his individual capacity, for goods or produce, did at first present

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some difficulty. I do not deem it important now, to attempt explaining and elucidating it, because the present case is manifestly not one of that character, and it will be time enough to dispose of that case when it comes.

Allin being styled executor in the obligation sued on, cannot render his signature as an obligor efficacious. That is merely *descriptio personæ*.

## DEBT. *Letcher vs. Bank of the Commonwealth.*

[Mr. Owsley for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR GARRARD COUNTY.

*April 9.* Chief Justice Robertson did not sit in this case.—Judge UNDERWOOD delivered the Opinion of the Court.

Case formerly  
in this court—  
Error in the Re-  
port—in 3 J. J.  
*Marshall*, 195.

THIS cause was heretofore in this court. A report of the case may be found in 3 J. J. *Marshall*, 195. We refer to it for a statement of the case, and for the principles settled. It is proper to remark, that the word *not* has been interpolated, by the reporter or printer, in the 17th line of page 197, whereby, as it reads, the court is made to assert a proposition which is at war with the long settled principles of the law. The manuscript opinion does not contain the word thus improperly inserted.

But two judges  
sitting here, and  
differing in opi-  
nion, the decia-  
ion of the circuit  
court, on the  
point, prevails.

Upon the return of the cause to the circuit court, Letcher filed three pleas; to two of which the bank filed demurrers, which were sustained. We differ as to the validity of the pleas demurred to. I think they constitute no defence to the action. Judge Nicholas is of a different opinion. The consequence is, that the judgment of the circuit court, sustaining the demurrers, is affirmed.

Trial, on a plea  
of payment.

A trial took place upon the issue joined on a plea of payment.

It seems from the proof, that the note sued on was discounted at bank, and the amount thereof, less by the discount, paid to Wilson—the Letchers being his sureties only. After the note became due, another note, signed by the same obligors, and for the same amount, was presented by the principal obligor to the bank, for discount, and was accordingly discounted. The amount of this last note was not paid over to Wilson; but, according to the usage of the bank upon discounting notes for the purpose of renewal, a credit was entered on the books of the bank, in favor of Wilson, for the amount of the note sued on. The witness stated, that it was the custom of the bank, when notes were renewed, to deliver up the old note, if applied for; but whether the note sued on was then applied for, and delivered up to Wilson, he could not say. It moreover appeared, that a third note, purporting to be signed by the same obligors, had been presented by Wilson, for discount, and was accordingly discounted by the bank. When this third note was discounted, Wilson owed the bank two debts—one being the note discounted, which renewed the note sued on. The object in presenting the third note, was to consolidate both debts in a new note. After the third note was discounted, no money was paid to Wilson; but the proceeds of the third note, less by the discount, were credited, according to the custom of the bank, against the notes previously given by Wilson &c., and which were renewed by the discount of the said third note. It seems that this third note was afterwards put in suit by the bank, and the Letchers were exonerated from its payment, upon the plea of *non est factum*.

Upon this evidence, the court instructed the jury to find for the plaintiffs—allowing certain credits. The propriety of this instruction is the only remaining question.

If the proceeds of the second note, discounted to renew the note sued on, should be applied as a payment, then the note sued on has been fully satisfied, and the instruction of the court was erroneous. But if the proceeds of the second note, and which were entered as a credit to Wilson &c., in order to balance their liability

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Facts of the case  
—as they appeared in proof.

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A party who is induced, by fraud or imposition, to enter a credit for a payment — as, for the amount of a note which turns out to be forged, in whole or in part—may disregard the transaction, and cancel the credit.

for the note sued on, ought to be entirely disregarded, then the instruction of the court was correct.

We leave out of view the third note, because the Letchers avoided its payment by the plea of *non est factum*, and we are not disposed to have a just debt paid by a note in part or altogether forged. When the third note was discounted, the president and directors of the bank, no doubt, believed it to be genuine. If they were induced to give a credit by fraud or imposition, we think it competent for them to cancel that credit, and refuse to abide by it, upon the discovery of the fraud or imposition. It was certainly an imposition upon the bank, on the part of Wilson, to offer, as genuine, a spurious note.

Nothing, however, in the present record will authorize us to denounce the second note in any respect. We, therefore, feel ourselves bound to regard it as a genuine note, discounted in good faith, for the purpose of renewing the note sued on. In like manner we regard the credit given, in order to balance the first note, or the note sued on, as fairly made, and not superinduced by fraud. At least, we think the jury, from the evidence, were so authorized to regard it. The effect of the credit so given is to be considered. Was it an extinguishment or payment of the first note? We think it was, and that it can be so regarded without at all militating against the doctrine, that one note cannot be pleaded by way of accord and satisfaction for another, due at the time the second is executed, when the parties to both are the same. When the parties are not the same, one note may be pleaded as accord and satisfaction of another. *Hanson vs. Cowan*, 7 *Monroe*, 574. In the case of *Harlan vs. Wingate's Adm'r*, 2 *J. J. Marshall*, 38, it was said, "notes may be a good payment if they are accepted as such." In that case, Harlan paid off a note due Wingate, by executing his note to Warren. In the case of *Castleman vs. Holmes*, 4 *J. J. Marshall*, 3, it was said, "when a debt is continued by renewing notes, each renewal is to be regarded as a new contract. The old contract is then settled, and the old note is then generally cancelled. These transactions, of renewing debts by new notes, are equivalent to paying the existing

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= 1  
A note given, for a debt secured by a previous similar note, which had become due, is no satisfaction of the debt. But if the parties to the new note are different, it may be pleaded as an accord and satisfaction.

Where a Bank discounts a note for the purpose of renewing a former loan, in the usual way, the negotiation seems to be equivalent to a new loan, and an independent payment of the old debt—not merely giving one note as satisfaction of another.



debt, and again borrowing the money. The old debt is paid off by the new."

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A question whether a note was given for a loan, or merely as a payment of a similar note already due—is one of fact, to be decided by a jury.

Now, according to the ordinary course of business in bank, as proven by the testimony in this case, there is a record kept of the renewal and continuation of debts by new notes. When the new note is discounted, the money, which the drawer of the note is entitled to in consequence of the discount of his note, instead of being paid over to him, is applied, by an entry on the books of the bank, in payment or discharge of the old note. This is substantially the same thing as if an entry was made on the back or face of the old note, "satisfied by payment in full." And the whole transaction is equivalent to drawing the money resulting from the discount of the new note, and then paying it back in discharge of the old note. When a credit is thus fairly entered by the bank, and no improper practice has been resorted to in order to procure it, we see no reason why it should not be enforced as a payment. The new notes executed to the bank, are not notes for the original debt; but they are independent notes, offered for sale in order to raise funds to pay off the old debts. The contracts are essentially distinct. If, therefore, the bank has taken, in succession, a dozen notes, they are not to be considered as a dozen notes given for the same debt, but as so many distinct notes, each founded upon a separate consideration, to wit: a new loan on the part of the bank to the drawer. It is, therefore, not like giving a dozen notes, for the same consideration, to the same person. We are consequently of the opinion, that if the new contract, made with the bank, by the discount of the second note, was not affected by fraud or deceit; if it was obligatory upon the parties, being fair, and the credit in discharge of the note sued on, being consequently fairly obtained, the old note has been paid off. These things should have been left to the jury. The instruction of the court was positive, and allowed the jury no discretion.

The judgment must, therefore, be reversed with costs, and the cause remanded for a new trial, to be conducted in conformity to this opinion.

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DEBT. **Blanchard vs. The Maysville, Washington,  
Paris and Lexington Turnpike Co.**

[Messrs. Morehead and Brown for Appellant : Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

April 10.

Chief Justice ROBERTSON delivered the Opinion of the Court—in which Judge Underwood did not concur.

Suit for the damages, which a jury had awarded the pltf. for the location of the road thro' his land.

THIS is an action of debt, instituted by David Blanchard against "the *Maysville, Washington, Paris and Lexington Turnpike Road Company*," to recover two hundred and twenty dollars, assessed (upon a writ of *ad quod damnum*,) as the damage resulting to him from the location and construction of the turnpike road of the company through his land.

After setting forth the acts of assembly in incorporating the company and defining its rights, powers and duties, the declaration avers that, as the company was desirous to extend its road through Blanchard's land without delay, he agreed that it might progress, without first ascertaining and paying the amount of damage which he would sustain; but with the express understanding, that he claimed damages, and that the company would, in reasonable time, proceed, according to the 13th section of its original charter, to have the damages assessed, and would, when so assessed, pay to him the ascertained amount; that, accordingly, the company "*located and had partly constructed*," the road through his land; when, pursuant to the agreement, and at the instance and upon the motion of its managers, a writ of *ad quod damnum* was issued, by order of the county court of Mason, for assessing the damages which *would accrue* to him in consequence of the construction of the road through his land; that the damages which *he had sustained and would sustain*, were assessed to two hundred and twenty dollars, and that the inquisition having been reported to the county court, and approved, the court made an order directing the company to pay the two hundred and twen-

ty dollars, and declaring that, upon making payment, but not otherwise, it might use the road. The declaration, after exhibiting the order for the writ, the inquisition itself and the order thereon, concludes by averring, that the company had funds sufficient for paying the damages assessed, and have failed and refused to do so;—but nevertheless had completed and continued to use the road through his land.

The company demurred to the declaration; and the circuit court sustained the demurrer, and thereupon gave judgment against Blanchard.

As the company is sued in its true corporate name, and as the declaration is in apt form, and contains appropriate allegations, two questions only will be considered by this court—*First*: does the declaration shew that the appellant has any cause of action against the appellee? *Second*: is *debt* an appropriate action?

I. Whatever diversities may be supposed to exist between the ancient and modern decisions, as to the capacity of a corporation to bind itself by express contract without its common seal, and however undefined the cases may be supposed to be, in which, according to many authorities, such a capacity exists,—there can be no doubt that a *statutory* corporation may be liable to an action upon a liability imposed by its charter, or resulting, by implication of law, from its acts; and records and judgments, even erroneously rendered, on parol contracts, but unreversed and not void, may impose legal liability on all corporations.

Whether the declaration shews any such legal cause of action in this case, may depend upon the proper interpretation of the 13th section of an act of 1829, (*Session Acts*, p. 155,) by which the company was first incorporated, and which section is as follows:—"that it shall and may be lawful for the president and directors, by and with their superintendants, engineers, artists, workmen and laborers, with their tools and instruments, carts, wagons and other carriages, and their beasts of draught and burthen, to enter upon the lands, in and over, contiguous and near to which the intended road shall pass, having given notice of their intention to the owners and

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Judgment of the  
circuit court.

An action may be maintained against a corporation, upon a liability imposed by the statute by which it is established; or which results, by implication of law, from its acts; or upon a judgment.

The act incorporating the Maysville, Washington, Paris and Lex. Turn. Co. provides a mode of indemnity for the owner thro' whose land the road may pass. And he may prevent the construction of the road on his land, until the damages are assessed, and paid.

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occupiers thereof, or their agents : *provided*, that if the said owners or agents shall not agree with the said turnpike road company as to the damages which he or she may be entitled to, then it shall be the duty of the said president and directors of said turnpike road company, to make application to the county court of Mason, for a writ of *ad quod damnum*, to assess the damages which may have been sustained by such party ; and such proceedings shall thereupon be had as are directed by law in relation to the establishment of public roads ; and the jury shall take into consideration, the advantages and disadvantages resulting to the party claiming damages from the establishment of said road, and upon payment of the damages so assessed, or where no damages are assessed, it shall be lawful for said president and directors to open and make said road, and to dig and carry any stone, gravel, earth, or other materials, necessary for making and repairing said road."

This section secured to owners of land, through which the road should be constructed, indemnity for any damages which they should sustain in consequence thereof, and, in effect, provides that the company should not run its road through any person's land unless the owner should consent thereto, or unless it should proceed, in the mode prescribed, to ascertain the damages, and should pay the assessment. The owner of the land might object to the construction of the road until after an assessment had been made, and the amount assessed, had been paid. By proceeding to construct the road through the appellant's land, without previously adjusting, by agreement, or by inquisition, the damages which he might sustain, and which he claimed, the company would have violated the 13th section of its charter, and illegally invaded a private right, guarantied to him by the constitution, had not he assented. But that assent was given on the implied condition, that the company should afterwards have an inquest, and pay the amount which should be assessed by it.

If the company  
and the owner  
of the land agree,  
that the

As the appellant claimed damages, and as it was the duty of the company to have had an assessment, the law, which always implies an undertaking by a corpor-

ation to do whatever its charter imposes as a duty, implied a promise by the company that, if it should construct the road through the appellant's land, damages should be assessed and paid. As the company was anxious to proceed without being delayed by first having an inquisition, and was permitted, for its own convenience and advantage, thus to commence operations on the appellant's land, and to postpone the inquisition until after the road through his land had been "*partly constructed*," legal responsibility cannot be avoided by objecting that the assessment was not made as soon as the appellant might have required. The phraseology of the 13th section is not as explicit, or altogether as congruous, as it might have been; but considering the object of the section, and allowing a reasonable and practical import to its language, we cannot, without an unwarrantable perversion of its aim, and an unreasonable misinterpretation of its whole tenor, restrict its application to proceedings prior to the location or construction of any part of the road through the land of the appellant.

Both its letter and spirit seem to contemplate an inquisition as to damages which "*may have been sustained*." The section secured to the appellant a right to require an assessment and payment of the damages prior to any intrusion on his land. But surely it was never intended that he should forfeit the protection of the statute, by waiving the *priority* of payment which he might have exacted, but which nothing but a distrust in the company, or a captious spirit, could have prompted him to insist upon. And we cannot doubt that he might, at any time before the completion of the road through his land, have lawfully and effectually stopped its progress, until damages had been assessed according to the provisions of the 13th section, and had been paid to him.

Whether he could have suspended the use of the road after its completion, need not be decided, because that question does not seem to arise upon the declaration in this case. The solution of that question might involve several subordinate and incidental propositions: *First*. As the company could not legally appropriate the appellant's land, without his assent, or without paying him for it,

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work may go on, and the damages be assessed afterwards, the law implies a liability on the part of the corporation, to pay the damages when assessed.

The owner may stop the progress of the work upon his land, at any time before it is completed.

Questions, as to the rights and powers of the owner of the land, suggested — not decided.

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would it have a lawful right to the road without making such payment, if he objected to the use of it, as a public highway, until he should be paid? *Second.* Would he have any remedy by suit, for recovering damages? *Third.* As trespass could not be maintained, would debt lie in such a case? *Fourth.* Would an assessment of damages, upon a writ of *ad quod damnum*, be legal and binding in such a case? And *fifth.* If there had been no such assessment, might the appellant have maintained debt for such damages as a jury should assess on the trial of the suit?

Where an act establishing a road company provides for indemnities to the owners of the land thro' which the road may pass, and the amount of damage to an owner has been ascertained, in the mode prescribed by the act, the corporation is liable for the payment, and to the action of the owner, without a stipulation under the seal of the corporation, or any express contract.—See *ante*, p. 87.

But the declaration avers that, when the writ of *ad quod damnum* was ordered, on the application of the company, the road through the appellant's land had been "*partly constructed*" only; and we cannot perceive why, if the appellant had a right to prevent the *commencement* of the road through his land, he had not an equal right to prevent its *completion*, before an assessment and payment of damages, according to the provisions of the 13th section. And therefore, it seems to us, that the assessment, as made, was legal, and that, consequently, a legal obligation to pay the amount assessed, was imposed on the company.

The assessment legally ascertained the amount of liability; the company has constructed the road, and is using it; and is under a legal, as well as moral obligation, to pay the damages which had been assessed. Is it liable for nothing? Trespass cannot be maintained. Has the corporation a right to pay only what it may be pleased to offer, or nothing? Has the appellant a right to prevent the use of the road until he shall have been paid? Can he destroy it? And shall he be told that no other resource remains to him? Even *that* would afford him no reparation for the loss which he may have sustained in consequence of the construction of the road. It was certainly the *duty* of the corporation to pay damages; and, having constructed the road, a legal obligation devolved on it to pay the sum ascertained by the inquisition, at its own instance, pursuant to its charter, and according to its prior obligation. From the charter—from the act of constructing the road (the appellant claiming

damages,)—and from the assessment by authority, and with the approval of the county court,—a legal liability to pay the sum so assessed, resulted by operation of law. The intervention of the corporate seal was unnecessary—express contract was not necessary—the liability is as well authenticated and imposed as it could have been by express contract under the corporate seal. Upon such a liability there must be a right of action. The extrajudicial remedy by the party's own act, cannot be the only remedial resource. It is only collateral and preventive. It was a natural and constitutional remedy, which the company's charter could not have affected. The corporation could have had no constitutional right to appropriate the appellant's land without his assent, or without first paying him an equivalent. The summary remedy, prescribed in the 13th section of the charter, is only declaratory of the law of nature, guarantied by the constitution, and was expressly authorized (in the act of 1829,) merely to prevent collisions and strifes, and afford a cheap and expeditious mode of liquidating damages. As there is a legal obligation to pay the two hundred and twenty dollars, it may be enforced by an appropriate common law action, which has not been superseded, or interdicted by statute, and is perfectly consistent with the more expeditious statutory, or natural, remedy.

II. To enforce such a legal, or implied, liability as that which has devolved on the corporation, debt is an appropriate form of action. 1st. *Chitty on Plead.* 95-6. *Wheaton's Selwyn, Title Debt.*

Wherefore, it is the opinion of this court (Judge Underwood dissenting,) that the judgment of the circuit court be reversed, and the cause remanded with instructions to overrule the demurrer to the declaration.

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The right of the owner to indemnity for having his land appropriated to a public road, is founded on the law of nature, and the constitution—the statute gives the remedy.

*Debt* is the appropriate action to recover of a corporation, the damages, allowed by a jury, according to law, to the owner, whose land has been taken for the road of a corporation.

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CHANCERY.

## Waller against Demint.

[Mr. Richardson for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR GALLATIN COUNTY.

April 11.

Chief Justice ROBERTSON delivered the Opinion of the Court.

If a party in possession of slaves claimed by another, acknowledges the title of, and holds under, the latter, such holding is not adverse, and the statute of limitations does not run against the claim — if admitted within five years.

The fact that the comp't was lulled by delusive hopes of compromise, till the statute had barred his claim at law, does not give the chancellor jurisdiction.

Want of averment—in a bill filed to avoid the statute of limitations, on the ground that the def't had countenanced complainant's claim and encouraged hopes of compromise — that such acts of the defendant were done within five years, is itself ground of demurrer to the bill.

THIS is a bill in chancery filed by William Waller against William Demint, alleging that the latter held slaves the property of the former, which could not be recovered in an action at law, in consequence of the time which had elapsed since the cause of action had accrued; but that frequently, during the period within which a suit at law might have been maintained, Demint had lulled him (Waller,) by propositions of compromise, and by expressing the opinion that he (Waller,) was entitled to the slaves, and a determination to give them up. The object of the bill is to avoid the statute of limitations, and obtain a decree for the slaves. The circuit court sustained a demurrer to the bill.

If the allegations of the bill be deemed sufficient to shew that Demint recognised the title of Waller, and held under it, or surrendered to him his claim, within five years, then, as the adversary possession was thereby extinguished, the statute of limitations would not have been available at law. And if that deduction be unauthorized, the fact that Waller was lulled by delusive hopes, or expectations, cannot give the chancellor power to enjoin Demint from the benefit of the statute of limitations, and to decree the slaves to Waller.

Whether the object of the bill be a specific execution of an implied agreement to surrender the slaves, or a decree for an avoidance of the statute of limitations, the chancellor had not jurisdiction. If, under other circumstances, any relief could be afforded, there should be none in this case, because the bill does not allege that



any assurance was given by Demint to Waller, within five years immediately preceding the institution of the suit. This would be a sufficient reason (had there been no other,) for sustaining the decree of the circuit court.

Spring Term  
1833.

Decree affirmed.

### *Smiley against Smiley's Adm'r &c.*

COVENANT.

[Mr. Crittenden and Mr. Chapeze for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR NELSON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 11.

THIS is a suit in chancery instituted by Mrs. Smiley, to recover her share of the proceeds of the sale of certain slaves of her deceased husband, who died intestate, and childless. By an agreement between her, the heirs and administrator of her husband, the slaves had been sold by the administrator, and the proceeds retained by him, to await the determination of the question, whether by law she was entitled to a half, or only a third, of the slaves for life. The circuit court determined that she was entitled to only one third of the money for life, and that she should obtain that, only on the previous condition of her entering into bond, with sufficient surety, to refund it to the heirs, at her death. It is now contended in her behalf, that she was entitled to the value of her life estate in a moiety of the slaves; and, if only to a third, then the value of that third should have been decreed to her absolutely, instead of the use of a third of the proceeds of the sale for life, and in any event, that it was improper to impose upon her the condition of giving security to refund the money at her death.

Suit by a widow, to ascertain and recover her due proportion of the proceeds of her husband's slaves, which had been sold by agreement of those interested

The first question arising out of the case, is, whether she was entitled to a half, or only a third, of the slaves for life.

Spring Term  
1833.

*Smiley*  
vs.  
*Smiley's*  
*Adm'r &c.*

By the act of 1798, slaves descend and pass as real estate—the act of 1797, for the distribution of intestates' goods and chattels, therefore does not apply to them, and the right of the widow to dower in the husband's slaves depends on the common law, (restricted by statute;) and she takes, for life, a third part of the slaves of which he died possessed—not of those which he had held, but had parted with.

The 28th section of the act of 1797—1 *Dig.* 527, provides, that when “any person shall die intestate as to his goods and chattels, or any part thereof, after the funeral debts and just expenses paid, if there be no child, one moiety, or if there be a child, one third, of the surplus shall go to the wife; but she shall have no more than the use for her life of such slave as shall be in her share.” At the passage of this act, slaves were, as they are here treated, personalty.

By the 28th section of the act of 1798—2 *Dig.* 1155, it is declared, that slaves shall be real estate, “and shall descend to the heirs and widows of persons departing this life, as lands are directed to descend in and by an act of assembly entitled, an act directing the course of descents.”

This act, by converting slaves into real estate, abstracted them from that class of property denominated goods and chattels, and consequently placed them without the letter of the above cited section of the act of 1797, which directs the distribution of an intestate's goods and chattels. But it is insisted, that, as the act of 1798 makes no specified provision for a widow out of an intestate's slaves, either by its own clauses, or by force of the reference to the statute of descents, she can take no part of the slaves, except by virtue of the statute of distributions; and therefore, the court should not give such effect to the act of 1798, as to vacate the provision made for her in the statute of distributions. If we could concede that the act of 1798 does give her no interest in the slaves, we should be bound to accede to the conclusion, to which we are urged; for we could never presume the legislature intended to strip her of all interest in the slaves, and would resort to any allowable construction of the statutes, to prevent such result.

We lay no stress upon that part of the act of 1798 which says, slaves shall descend to the heirs and widows of intestate persons, as lands are directed to descend by the act of descents. A dower right does not come by descent, and besides that mode of expression being a very inappropriate one to designate a dower interest, the statute of descents to which reference is made to shew

how slaves shall descend to the widow, makes no provision for a dower interest. The only mention made of the widow, in the statute of descents, is where she is constituted heir to her husband, when he dies without kindred. We, therefore, can place no more effect upon the act, than if the words, "shall descend to the heirs and widow as land," had been entirely omitted.

A widow, by the common law, is entitled to be endowed of one-third part of all the lauds, tenements and hereditaments of which her husband was seized during coverture. When slaves were converted into real estate, and a descendible quality thereby given to them, they were brought within the operation of the common law rule, which provides for the widow's dower. For it will be found on examination, that her dower right was not restricted to what was literally and strictly speaking land, but embraced all or nearly all of that description of moveable property that was denominated real estate, and which went to the heir, instead of the personal representatives. Among the things of that description which are enumerated by Lord Coke as subject to her claim, he expressly mentions that she was entitled to dower out of a villein. See *Co. Lit.* 32 a, 164 b. What would have been the effect upon such slaves as the husband sold in his life time, as to her dower claim, if the legislature had not, in subsequent clauses of the act, manifested an intention, inconsistent with any such claim, we need not determine. If the opinion we have expressed, that the mere circumstance of converting slaves into real estate, had the effect of entitling the widow to one third of those her husband died possessed of, needed any confirmation from an express indication of legislative intention, it could be found in that part of the act of 1798, where it speaks of the widow's right in her intestate husband's slaves as a "dower" right, a phrase of settled legal signification, and wholly inappropriate to the designation of a distribution right out of personalty.

We concur, therefore, with the circuit court, that *Mrs. Smiley* was entitled to only one third of the slaves for life ; but cannot agree with that court as to the mode

Spring Term  
1833.

*Smiley*  
vs.  
*Smiley's*  
*Adm'r &c.*

Spring Term  
1833.

*Smiley*

vs.

*Smiley's  
Adm'r &c.*

The heirs, administrator and widow having agreed, that the slaves of the intestate should be sold, and the proceeds divided according to their respective rights—held, that the widow is entitled—not merely to the use of her proportion of the money for life, upon giving security for its payment to the heirs upon her death—but to so much, absolutely, as her life estate in one third of the slaves may be worth, reference being had to their productiveness, by hire, &c.

of compensating her for that interest out of the proceeds of the sale.

By the agreement to sell the slaves, we can infer nothing but a mutual understanding that the proceeds were to be divided between the widow and heirs, according to the value of their respective interests. She was willing to take, in money, the value of her life estate in her third of the negroes, and they to receive, in like manner, the value of their residuary interest. If the heirs receive at her death, the whole amount of what a third of the slaves sold for, they are secured the full value of the slaves at her death, without running the hazard, which they would otherwise have had to incur, from the death of the slaves, or their depreciation in value, from the widow's use of them during life. On the other hand, if the widow has only the use of the money during life, with the obligation of returning the whole of the principal at her death, she is made to commute the use, or value of the hire, of the slaves, for six per cent. per annum interest on the money, which is by no means a fair equivalent. A slave worth only from four to five hundred dollars, may command from seventy to one hundred dollars for a year's hire, whilst the interest on his value is only from twenty four to thirty dollars. It is true, that if she retained the slave, and used or hired him out, she would have to incur the hazard of his death, whilst if she takes the money, there is no hazard of its destruction in its use. But it has often been determined, in usury cases, that the value or cost of this hazard, is by no means equivalent to the difference between the value of the hire and the interest on his price.

However, without resorting to our personal knowledge to ascertain the existence of such difference in point of fact, it is enough that we do know that there may be such difference, and we think the rule of compensation to her, should be, to decree her, absolutely as her own, whatever may be the value of her life estate. We should deem it an unanswerable argument in favor of this mode of adjustment, even if there were no other in favor of it, that it obviates the necessity of compelling her to give

security for refunding the money at her death, which is a condition she may not be able to comply with.

What is the value of her life estate, depends upon such a variety of circumstances, some of which must necessarily be peculiar to each case, that it is impossible to lay down any general rule for ascertaining it. Like all other questions relative to the value of property, it is best ascertained by the adjustment of a jury, from the proof of witnesses.

The decree must be reversed, with costs, and the cause remanded, with directions to ascertain, by the verdict of a jury, the value of the complainant's life estate in the slaves, and for a decree to be rendered in her favor against the administrators, for the value so ascertained.

Spring Term  
1833.

*Morris*  
vs.  
*Bowles.*

The value of an interest in slaves involved in a suit in chancery, should be ascertained by a jury

## Morris vs. Bowles.

TRAVERSE  
OF FORCIBLE  
DETAINER.

[Mr. Hansen for Appellant : Messrs. Morehead and Brown for Appellee.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 15.

As Morris entered on the land in his own right, as the husband of the occupant, and did not *obtain the possession* as the *tenant* of the appellee, or any other person, the judgment against him, for restitution, cannot be sustained. He did not enter against the will of the appellee, or of any person for whom, or from whom, he derives his right, or who had right at the time of the entry : and therefore, though he afterwards became the tenant of the appellee, he is not liable to eviction in a proceeding by warrant for a forcible detainer. The statute regulating proceedings for forcible entry and detainer does not apply to such a tenancy. See the 16th section, 1st. Dig. 612, and *Helm vs. Slader* (1st. Mar. 320,) and *Jack vs. Carneal* (2nd. Mar. 518.)

When the entry of the tenant was in right of his wife, who was in possession of the premises, (and so not a forcible entry,) he is not liable to eviction by a warrant, although he may have taken a lease from the plaintiff after the entry.

Judgment reversed, and cause remanded for a new trial.

Spring Term  
1833.

MOTION.

**J. Wilson *et al.* vs. Sarah Wilson.**

[Mr. Sanders for Plaintiffs: no appearance for Defendant.]

FROM THE GRANT COUNTY COURT.

April 15.

Chief Justice ROBERTSON delivered the Opinion of the Court.

County ct. may compel the father of a bastard child to give bond and security for its maintenance. — But has no power to render judgment against a putative father without a trial, and proof of the charge; or to order execution, or give judgment, for the instalments, (before bond forfeited,) on the order for maintenance.

HAVING been charged with being the father of a bastard child, of whom Sarah Wilson had been delivered, Jacob Wilson entered into a recognisance, with John Wilson his surety, for his appearance in the county court.

On the day fixed for his appearance, the principal, and his surety also, were called, and failing to appear, the county court entered a judgment against *them both jointly*, in favor of Sarah Wilson, and *without trial or proof*, for one hundred and seventy five dollars, for the maintenance of the child, payable in seven consecutive, annual instalments, and ordered that executions should issue for enforcing the payment of each instalment as it should become due.

That judgment is now called in question; and must be reversed, for error from the beginning to the end of the action of the county court.

The court had no power to render a judgment, even against the putative father, without a trial and proof. Nor had it any right to order execution, on even an authorized judgment for maintenance: its utmost power extended no further than to exact a bond with security.

But still more palpable and anomalous is the error in the judgment against the surety in the recognisance. By agreeing to be responsible for the appearance of his principal he incurred no liability for the maintenance of the child. For a forfeiture of his recognisance he was only liable to be proceeded against for the penalty. We need not notice other errors.

Wherefore, the judgment of the county court is reversed.

A surety in the recognisance for the appearance of one charged as the father of a bastard, incurs no liability for its maintenance — upon failure of the principal to appear, the recognisance is forfeited, as to him and the surety, and both are liable for the penalty.

Spring Term  
1833.

CHANCERY.

**Burchet &c. against Faulkner &c.**

[Mr. Triplett for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR LAWRENCE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 15.

BURCHET and others bought from Faulkner, two tracts of land, on the Tug fork of Sandy, in the "Capley Settlement," for which they agreed to pay him twelve hundred dollars, in instalments of three hundred dollars, if his title should be established as paramount, in any suit, (which might be brought against Smith and Taylor, and any other person who might hold an adversary claim,) and which they covenanted to institute, "*in any manner that should be deemed most proper by good counsel.*"

Statement of the facts.

Efforts were (shortly afterwards) made by a surveyor and others, to find the beginning corners, the lines, and other corners, of the two surveys, under which Faulkner asserted his title; but no corner, or marked line, was found, which furnished any clue for identifying his claims; and, therefore, Burchet and his associates in the contract deemed a suit for trying such vagrant and intangible claims, not only unnecessary and fruitless, but inexpedient; and filed a bill in chancery, to enjoin a judgment on one of the instalments of the consideration, and to obtain a rescission of the contract.

Among other matters, their bill alleges, that Faulkner agreed, that if they should not, by a fair experiment, be able to identify his claims, as represented by himself, and understood by them, at the time of the contract, their covenants should not be obligatory; and, also, denies that Faulkner has any title whatever to the tracts which they bought from him; calls on him for an exhibition of his documents of title; and avers, that, through fraud or mistake, the written memorial of the verbal agreement omitted some material parts of it. Bill.

Faulkner denies fraud, and avers that he has good legal titles to both parcels of land as sold. But his answer, though it denies, in general terms, that any "ma- Answer.

Spring Term  
1833.

*Burchet &c.*

vs.

*Faulkner &c*

Decree of the  
circuit court.

Defence made  
at law.

An attempt at  
law, to plead  
and rely on mat-  
ters insufficient,  
will not bar re-  
lief in equity on  
the same mat-  
ters.

Vendee of land  
having agreed to  
bring suit to es-  
tablish the title  
of his vendor,  
but failing, after  
diligent search,  
to find the lines  
or corners, or any  
title in his  
vendor, may re-  
scind the con-  
tract, without any  
such suit.

Mistake in writ-  
ing a contract,  
is ground for a  
rescission.

terial" part of the agreement was omitted in the covenant, does not deny, explicitly or directly, the allegation, that, unless the corners or lines of his surveys could be identified, the contract should not be obligatory. And he failed to exhibit any title to either of the tracts.

The circuit court dissolved the injunction, and dismissed the bill ; and this writ of error is brought to reverse that decree.

In the action on which the judgment which was enjoined had been rendered, the plaintiffs in error had pleaded a failure of consideration, and fraud and mistake, and issues on these pleas were tried.

The circuit court seemed to consider that defence at law a bar to a rescission of the contract. But, in that view of the case, the Judge was mistaken. It is evident that the grounds now presented for rescission, could not have been available at law. The alleged mistake was not pleadable ; and the want of title would have been insufficient to establish a failure of consideration.

The circuit court seemed also to think, that there should be no relief because the plaintiffs had not brought any suit to try title, as they had agreed to do. In this, too, the Judge erred. It was certainly not the duty of the plaintiffs to sue an adversary claimant, unless they could find some vestige of claim in the defendant ; and the proof shews satisfactorily, that frequent and vigilant efforts to find some correspondent mark, or corner, or line, proved ineffectual.

Moreover, the alleged omission in the memorial of the contract is clearly proved, and that proof is competent to shew a mistake in the execution of the writing, because such a mistake has not been directly or properly denied.

This ground, especially when connected with the fact that the defendant has failed to exhibit any title whatever, should be deemed sufficient to authorize a decree rescinding the contract.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with instructions to decree a rescission of the contract between the plaintiffs and the defendant in error.



Spring Term  
1833.

# Beaty vs. Judy and her children, persons of color.

TRESPASS.

[Mr. Amos Davis for Plaintiff: Mr. James Trimble for Defendants.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 16.

THIS is a joint action of trespass, for assault and battery and false imprisonment, prosecuted in the names of Judy and her three children, Caroline, Shelton and Howard.

Suit for freedom  
—in which several  
pltf's join.

George Beaty, the defendant in the action, (plaintiff here,) pleaded, that Judy and her children were slaves; and the jury was sworn to try the issue, concluded by a negation of that allegation.

Defence — the  
pltf's are slaves.

After a deed from Daniel Beaty and wife, emancipating Judy and her children, and other slaves, on the 2nd. of January, 1832, had been proved, and read to the jury, George Beaty offered to prove, and to read, the following writing:—"I, Daniel Beaty, of Montgomery county, and state of Kentucky, being old and infirm, and finding my incapacity to manage my own affairs, and I have appointed George Beaty to manage my business in this life, and have deeded to said Beaty my plantation whereon I now live, as a part consideration for the maintenance of me and my wife, for and during our natural lives, in a decent and comfortable manner. And if said George Beaty shall provide for me and my beloved wife during our lives as aforesaid, (I do agree in addition to the land,) I have delivered and give up to the said George Beaty, all my personal property of all and every kind whatsoever, and authorize him to do what he please with the same. Given under my hand and seal, this 20th day of December, 1831."

Writings offered  
in evidence.

"Zedekiah Davis.

DANIEL BEATY.

Zachariah Davis."

GEORGE BEATY."

But the court refused to permit the proof to be made.

The plaintiff in error then read a power of attorney from Daniel Beaty to himself (the plaintiff,) dated De-

Spring Term  
1833.

Beaty

vs.

Judy &c.

A power of attorney authorizing the agent to sell, vests no title in him.

The phrase—"personal estate"—in wills and contracts, includes slaves.

A writing which recites that D B is unable to manage his affairs, and has deeded his farm to G B, in consideration of future maintenance, and proceeds—"and if said G B shall provide for me and my beloved wife during our lives, as aforesaid, (I do agree in addition to the land) I have delivered and give up to the said G B all my personal property of all and every kind whatever, and authorize him to do what he please with the same," is an executory con-

vention 24th, 1831, authorizing him to sell, for and in Daniel's name, every species of property then "owned or possessed" by Daniel, "either land, slaves, or personal estate;" and the jury having thereupon found a verdict for the defendants in error, the court overruled a motion for a new trial, and rendered judgment on the verdict.

As the power of attorney did not vest any legal right of property in George Beaty, or even recognise such a right, and was subject to revocation, express or implied, it could not have had any effect on the deed of emancipation whereby, as to the slaves, it was revoked; and consequently, the motion for a new trial was properly overruled, unless the court erred in refusing to permit the contract of the 20th of December, 1831, to be proved. Whether, in that particular, there is error, or not, is the only question that has been discussed.

It has been frequently said by this court, that the phrase—"personal estate," in wills or contracts, without any other restrictive expression, or provision, should be construed as embracing slaves. (*Plumpton vs. Cook*, 2nd. Mar. 450. *Chinn et ux. vs. Respass*, 1st. Monroe, 28—and other cases.)

But whether the contract of December 20th, should be interpreted as comprehending slaves, or whether that contract and the power of attorney between the same parties, dated only four days afterwards, and which indicates that they considered slaves and personalty as distinct denominations of property—should be considered, *in pari materia*, to ascertain the import of "personal estate" in the former, is not now deemed essential, for it is the opinion of this court, that the contract of December the 20th, was only executory, and dependent on a precedent condition for its fulfilment, on the part of Daniel Beaty. It purports to be a *mutual covenant* by both parties. It does not convey, or covenant to convey, the land, but recites the fact that a conveyance had been made in part consideration of George's covenant. If the parties had intended that the title to the slaves and other property should also pass absolutely, and *eo instanti* with the land, they have employed inappropriate language, and resorted to unnecessary circuitry. And had that been

their intention, it was unnecessary and incongruous to say, "*I have employed George Beaty to manage my business*;" it was nonsensical to say, "and if George Beaty shall provide for me" &c. "*I do agree*" &c.; and it was not only unnecessary for George to subscribe the agreement, but the expressions, "*have given up and authorize him to do what he please with the same*," were altogether superfluous. Though the phraseology of the contract is somewhat confused and ambiguous, yet considering it altogether, and giving effect to the whole consistently with every part, it seems to us that nothing more was intended, than that George Beaty should be sole *manager* for Daniel Beaty, and should, therefore, control the slaves and other property as he should please, during the lives of Daniel Beaty and his wife; and that, upon their deaths, if George had, in the meantime, faithfully fulfilled his contract, the property should be his. If this be the true interpretation of the agreement, the *title* to the slaves still remained in Daniel Beaty, and therefore, he had a perfect legal right to emancipate them, without any other liability than his personal responsibility to George Beaty, for disposing of that which he had agreed that George might have upon a prospective contingency. The agreement being only executory, no title whatever had passed to George.

Wherefore it seems to this court, that the circuit court did not err in rejecting the agreement, or in overruling the motion for a new trial.

But nevertheless, we are of the opinion, that the judgment cannot be sustained, because the defendants in error could not maintain a joint action, for personal and individual injuries, or for the assertion of personal and individual rights.—*Violet et al. vs. Stephens, Lit. Sel. Ca. 148.*

Wherefore, for the latter cause only, the judgment must be reversed, and the cause remanded with instructions to set aside the verdict, and dismiss the suit without prejudice.

Spring Term  
1833.

*Beaty*  
vs.  
*Judy &c.*

tract, that vests no present title in the grantee: there was no error in rejecting it, when offered as evidence of title in the grantee, to slaves which the grantor afterwards emancipated.

Different plaintiffs cannot join, where the cause of action is not joint — a family of slaves can not be joined in an action for their freedom.

Spring Term  
1833.



SCIRE FACIAS.

**White vs. Brown's Administrator.**

[Mr. Tupper for Plaintiff : Mr. Breck for Defendant.]

FROM THE CIRCUIT COURT FOR GARRARD COUNTY.

April 16.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Error, to render judgment by default, while a negative plea, casting the *onus* upon the pltf. remained in the cause, not answered.

To a *scire facias* against Nancy White, as administratrix of James White, to revive a judgment against the intestate, she filed a plea denying that she was the administratrix. But the circuit court, at a subsequent term, rendered a judgment against her by default, without any proof, and without taking any notice of her plea.

As the plea was negative, and imposed the *onus* on the plaintiff in the *scire facias*, it was error to render judgment by default.

Judgment reversed, and cause remanded for further proceedings.

CHANCERY.

**Long against Dupuy.**

[Mr. Haggin for Plaintiff : Mr. Dana for Defendant.]

FROM THE CIRCUIT COURT FOR WOODFORD COUNTY.

April 16.

Chief Justice ROBERTSON delivered the Opinion of the Court.

In a bill upon a lost note, signed by a principal and surety, the principal is a necessary party—or his representatives, if he be dead, although he may have died insolvent.

THE only question which we shall consider in this case, is as to parties.

Long, a surety for one Wilkins, is alone sued in chancery, on their joint note, alleged to be lost.

Although a separate suit might have been maintainable at law against the surety, nevertheless, the chancellor should never render a decree against such an obligor, unless his principal be also a party, or a sufficient reason for not bringing him before the court, shall be made to appear.

The only reason assigned for suing Long alone, is the alleged death and insolvency of Wilkins; and even of that allegation there is no proof. The silence of Long's answer, as to those facts, is not an admission of their truth, because they are not charged to be, and cannot be presumed to be, within his personal knowledge.

Nor would proof of the insolvency or death of Wilkins have authorized a decree against Long alone. The chancellor cannot know what defence Wilkins, or his representative, might be able to sustain; nor can it be known, that a decree against him could not be made available. And therefore, under such circumstances, it is not consistent with the principles of equity to render a decree against the surety.

When a party asks relief he must place himself in such a condition as will shew that his prayer is equitable; and it is not equitable to exact from a surety that which the principal, or his representatives, should pay, and might be compelled to pay, if sued jointly with the surety.

Wherefore, for want of proper parties, the decree of the circuit court is reversed, and the cause remanded.

Spring Term  
1833.

*Greathouse*  
vs.  
*Hord.*

Allegations in a bill, of the death and insolvency of an individual—facts not presumed to be within the personal knowledge of the defend't, nor charged to be so, nor noticed in his answer—cannot be taken as true, without proof.

## *Greathouse against Hord.*

CHANCERY.

[Mr. Beatty for Plaintiff: Mr. Crittenden and Mr. Hord for Defendant.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 16.

ERROR has been inadvertently committed in this: the complainant, Greathouse, was entitled to a perpetuation of the injunction for thirty five dollars, with interest thereon from the date of the note, and the sheriff's commission on that sum, and its interest included in the replevin bond. It seems that the court deducted the thirty five dollars from the amount of the replevin bond, and dissolved the injunction, with damages, as to the resi-

Where a judgment is enjoined as to a part of the debt, the interest and sheriff's commission on that part, should be included.

Spring Term  
1833.

Greathouse  
vs.  
Hord.

Security in an injunction bond (the injunction granted out of court) is to be approved by the clerk — and so much of the order granting an injunction, as designates the security to be taken, is a nullity — the injunction is valid, altho' the clerk take a different security from that designated in such order.

\* Acts of Sess.  
1826, 127.

idue, thereby improperly charging the complainant with interest and commission on the thirty five dollars, and damages on the amount of such interest and commission.

The complainant contends, that the decree against him for damages is altogether erroneous, because there was in fact no injunction of the judgment.

The record exhibits an order for an injunction, granted by two justices of the peace, "upon the complainant entering into bond, with *Ezekiel Forman* his security, in the penalty of six hundred dollars, conditioned according to law." *Ezekiel Forman* did not join with *Greathouse* in executing the bond, but *Samuel Forman* did; and the question is, whether the failure of *Ezekiel* to execute the bond, as contemplated by the order of the justices, is sufficient to shew that there was no injunction. We think it was not. By the act of the 24th of January, 1827,\* it is made the duty of clerks to approve and accept the security in injunction bonds. It appears that the clerk did approve and accept *Samuel Forman*, and administered to him the oath provided for in the second section of said act. So much of the order of the justices as makes the injunction depend on the execution of bond with *Ezekiel Forman* as surety, ought, therefore, to be regarded as surplusage and against law.

The bond executed with *Samuel Forman* as surety, is good, and should, together with other acts of the complainant, as manifested by the record, estop him to deny that there was a subsisting valid injunction.

For the error first noticed, the decree is reversed, with costs, and the cause remanded for a decree to be entered, not inconsistent herewith.

Spring Term  
1833.**Buford's Heirs against McKee &c.**

CHANCERY.

[Mr. Kincaid for Plaintiffs : Mr. Owsley for Defendant.]

FROM THE CIRCUIT COURT FOR LINCOLN COUNTY.

Chief Justice Robertson did not sit in this case : Judge NICHOLAS delivered the Opinion of the Court.

April 16.

THE heirs of Henry P. Buford filed their bill against the devisee of Henry Paulding, to obtain specific performance of an alleged covenant from Paulding, for the conveyance, at his death, of a tract of land to Buford. The defendants deny that the covenant was executed by Paulding, or, if genuine, that it was given for any valuable consideration.

Covenant, made voluntarily—not based upon any consideration, either valuable or meritorious, can not be specifically enforced in equity.—The moral obligation to provide for a wife or children has been held sufficient to uphold such a covenant; but the same principle does not extend to collateral relations.

We shall waive a decision of the question, whether the covenant was executed by Paulding, inasmuch as we are clearly of opinion, that if it was signed by him, it was merely intended as a gift to his nephew, Henry P. Buford, and that Paulding received no valuable consideration therefor; and consequently, that we are bound to affirm the decree dismissing the bill.

In exercising the discretion, which the chancellor retains to himself, over applications for the specific performance of contracts, it has always been deemed an essential prerequisite, that the contract he is called upon thus to enforce, should be based upon, either a valuable, or what is termed a meritorious consideration. The moral obligation to provide for a wife or a child, constitutes such a meritorious consideration as will induce a specific performance of an agreement in their favor, and some of the cases have declared, that grand-children come within the rule; but we have been able to find no authoritative case where a voluntary agreement has been specifically enforced in favor of a collateral relation, such as a nephew, unless there was some other controlling circumstance besides the mere affinity. The cases where relief has been extended in favor of collaterals, either expressly recognise the doctrine, that some additional circumstance is necessary to call

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forth the interposition of the chancellor in their behalf, or by the stress laid upon such additional and controlling circumstance, indicate clearly that such is the rule of the court. See *Newland on Contracts*, 71 to 77, and cases there cited.

The whole foundation of the principle which turns mere gratuitous engagements and voluntary promises of bounty and munificence, into contracts of obligatory efficacy, is of such doubtful equity, that we feel no disposition to carry it farther than it has already gone.

The idea, which seems to have had some countenance from a few old cases, that an agreement in writing would be specifically enforced, merely because it was solemnized by the signature and seal of the party, has been long exploded.

In *Watts vs. Bullas*, 1 P. Wms. 60, where the court was applied to, for the purpose of aiding and supplying a defective, voluntary conveyance in favor of a half brother, Lord Keeper Wright was of opinion, that, as the consideration of blood would raise an use at common law, and as before the statute 27 Henry VIII, could have compelled an execution of such use, in a court of equity, so would that imperfect conveyance raise a trust, in respect of the consideration of blood, and consequently, ought to be made good in equity. Much stress appears to have been laid by this court upon the same argument, in *McIntire vs. Hughes*, 4 Bibb, 187, when assigning its reasons for affording relief in favor of a son; but there is no express indication of opinion, that it should be extended in favor of collateral relations also. In *Goring vs. Nash*, 3 Atk. 188, Lord Hardwick, commenting upon *Watts vs. Bullas*, said, Lord Wright's reasoning was too large, owing to his then being new in the court, and pursuing the maxims of law too far, as to the consideration of blood to raise an use in law, and which this court does not regard.

In an analogous class of cases, it seems to be well established, that a defective surrender will be supplied only in favor of three descriptions of persons, viz: creditors, wife, and children—see *Goodwin vs. Goodwin*, 1 Vez. 228. *Byas vs. Byas*, 2 Vez. 164. *Tudor vs. Anson*, 2 Vez. 582.

Decree affirmed, with costs.



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## Lamaster *against* Lair.

CHANCERY.

[Mr. Turner for Plaintiff: Mr. Owsley and Mr. Goodloe for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 17.

LAMASTER filed a bill in chancery, in the *Madison* circuit court, to enjoin a judgment (for forty dollars,) which had been rendered against him, in *Russell* county, by a magistrate. The only ground for the injunction was the alleged payment of the amount of the judgment. Lair, before service of process, entered his appearance, and demurred to the bill, and the circuit court sustained the demurrer.

Circuit court of one county has no jurisdiction to enjoin a judgment rendered in another.

As no relief could have been granted otherwise than by actually or virtually enjoining the judgment, the only question presented for consideration, is, whether the circuit court of *Madison* had jurisdiction to enjoin the judgment. For, if it had not such jurisdiction, the demurrer was properly sustained.

In *Mason vs. Chambers* (4th J. J. Mar. 407-8-9,) it has been decided by this court, that a circuit court in one county, unless it has derived jurisdiction over the whole subject matter, from some peculiar circumstance, has no power to enjoin a judgment of a circuit court rendered in another county. And there is nothing in this case by which it can be exempted from the application of the general principle there recognised.

Wherefore, as the bill stated a case in which the circuit court of *Madison* had no jurisdiction, the demurrer was rightly sustained.

And, as the decree dismissing the bill absolutely will not bar a similar bill in the proper court, because the *Madison* circuit court had no jurisdiction to adjudicate on the merits, there is no error in the absolute dismissal.

The dismissal of a bill absolutely, by a court which had no jurisdiction of the case, is no bar to another suit.

Decree affirmed.

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## DETINUE.

Pool vs. Adkisson *et al.*

[Mr. Morehead for Plaintiff: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR TRIGG COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.—  
Judge Underwood dissenting.

Statement of the  
case.

THIS is an action of detinue for two slaves, claimed by the defendants in error, (who were plaintiffs below,) under a deed of trust, whereby Edward Carlton, sen. transferred to them the right to the said slaves, and other property, for the payment of certain debts due by Carlton to persons for whose benefit the trust was created.

Verdict and judgment, in the usual form, for the slaves, or their value, having been obtained against Pool, he prosecutes a writ of error, and complains that the circuit court erred to his prejudice—1st. in refusing to admit certain testimony which was offered by him on the trial; 2nd. in overruling a motion for a nonsuit, and 3rd. in refusing to give to the jury an instruction proposed by him.

In an action to recover slaves conveyed (by a third person) to the plaintiff, in trust, to secure certain debts, evidence that the debts had been "paid or nearly so," was properly rejected—it would bear only upon a question proper for chancery.—See *Scobee vs. Jones &c. ante*, 13.

I. The matter rejected by the circuit court, was a cross bill of discovery, which had been filed by the plaintiff in error against the defendants, and taken for confessed; in which the only allegation pertinent in this case is, that the debts, for securing which the deed was given, had been "*paid, or nearly paid.*" The admission of such an allegation was insufficient to prove, either that the debt had been paid, or that the absolute title had been revested in the alienor; and could not have tended, legitimately, to bar, or affect, the cause of action for which this suit was instituted. But, if the slaves or their value be more than sufficient for the payment of the debts, a chancellor might, in a proper case, afford appropriate relief; but he alone could do full and final justice among all persons who may be eventually concerned.

II. If detinue be an appropriate action—and even if a person would not be liable, in *any form* of action, for disposing of the chattel of another, *bona fide*, as an agent of a person who was not the true owner, (which we will presently consider,)—nevertheless the circuit judge did not err in refusing to direct a nonsuit; because the jury *might* have inferred, that the plaintiff had *some* knowledge of the right of the defendants, and co-operated with his constituent in an effort to frustrate that right.

III. The plaintiff in error moved the circuit court to instruct the jury, “that if they believed from the evidence, that (he) had possession of the negroes sued for, only as agent of Carlton, and parted with possession of the same before any demand, or suit brought, without a knowledge of the plaintiff’s claim to them, they must find for the defendant.” The refusal to give that instruction furnishes the ground on which Pool mainly relies for a reversal of the judgment.

The proof was, that Pool took the slaves to Missouri, and had afterwards said to one witness, that he knew where they were, and to another witness, that he had sold them; there is no evidence that he had ever paid to the person who, as he says, employed him to sell them, the price, or any part of the price, for which they were sold, *if sold at all*. Nor is any such payment even hypothetically stated in the instruction as proposed. In considering the proposition, therefore, the conduct of the plaintiff should be viewed in the same light as it should be if he had admitted that he had not paid his constituent. \

Thus considering the case, two principal questions arise:  
*First.* According to the hypothetical case stated in the instruction, was Pool liable to any action whatever?  
*Second.* Is detinue an appropriate action?

*First.* That Pool’s conduct must be deemed *injurious* to the owners of the slaves, has not been denied in argument, and cannot be doubted. But his learned counsel insists, that his acts were those of his employer, who is *alone* legally responsible to the injured party, if, as an agent merely, he (the plaintiff,) acted in good faith and within the scope of his authority. Is such the true and

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Evidence, that the defendant—in detinue for slaves, which he had sold, as the agent of another, had some knowledge of, and co-operated to defeat, the title of the lawful owner, was proper for the jury, and sufficient to preclude a nonsuit.

Any person who has had the possession of, and has sold, used, or detained, the property of another—either for himself, or as the agent, or servant, of a stranger—is liable (in detinue) to the true owner, for the property, or its value—whether he was, or was not, consentant of the right of the true owner—and whether he had, or had not, parted with the possession, before the suit. See Judge Underwood’s opinion, *post*.

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The authority of an agent can never exceed that of the principal. —No one can confer upon another a power which he does not himself possess; or authorize another to act illegally. —Whoever, being of legal discretion, acts *tortiously*, or intermeddles with the property of another without his assent, or the authority of law, is personally responsible to the injured party; —and the fact that it was done as the agent, or by the request, or command, of a third person, is no excuse.

well settled doctrine of the common law? We think not: Far—very far—from it.

He who has no legal right to do a thing, cannot delegate authority to another to do it. The power of an agent, being altogether derivative, cannot exceed that of his principal. As between the person injured and the actual perpetrator of the wrong, no authority from another, who had no right, can change the legal character, or effect, of the wrongful act. The authority, so far as the wrong was concerned, was void, and therefore, cannot protect or excuse the immediate actor. The injured party has a right to look for reparation to him who was actually and immediately employed in the act from which the injury resulted. He may sue either the principal or accessory, the employer or employed, the constituent or his agent; and may (generally,) sue either one separately, or both jointly. No person has a right to dispose of the property of another, without his assent, or the authority of law; and if he shall do so, he will, according to a general rule of law, which has but few exceptions or qualifications, be legally responsible to the owner. As the *jus disponendi* does not belong to any person except the owner, or his agent, or the law, he who presumes to exercise that important right without proper authority, must do so at his peril, and upon his own responsibility. It is no legal excuse, that he acted as the voluntary or hired agent of another person who had no such right himself. The agent cannot avert legal responsibility for his own wrongful act, by pleading that he was employed, or directed, by a person who had no lawful authority. It is a general rule of law, that no person of legal discretion, whose *voluntary* act operates injuriously to the property of another, can exonerate himself from liability to the owner for reparation, by merely proving that he did not act *for himself*, but for another, who hired or requested him so to act, and who had no legal right to use, detain, or dispose of the same property in the same way. An agent, or servant is responsible for his own tortious act, even though it was done in submission to the command, or authority of his employer or master. See *Paley on Agency*, 315–16, and the cases there cited.

In note 23 to *Chitty's Blackstone*, (Vol. 1 p. 432,) the annotator says : "In every case where a master has not power to do a thing, whoever does it by his command, is a trespasser, (Rol. Ab. 90,) and this though the servant acted in total ignorance of the master's right.—(2 Rol. Ab. 431.)"

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The reason is stronger why a voluntary agent should be liable in a similar case. See 5 Burr, 2687.

Exercising unauthorized dominion over the property of another, or even asserting a right to it for another who has no right, may be, and generally will be, wrongful or "tortious" as to the owner. See 2 Strange, 813. 2 Saunders' Reports, 47, n. e. *Bristol vs. Burt*,—7 Johnson's Reports, 256. *Shotwell vs. Few*,—*Ibid.* 302, and *Murry vs. Burling*,—10. *lb.* 172. *Perkins vs. Smith*,—1 Wil. 328.

In *Perkins vs. Smith* (*supra*), a servant was held liable, in trover for goods which he had received from a bankrupt, (the owner when his bankruptcy occurred,) and had sold, at the master's request, to pay a debt due from the bankrupt to the master. It does not appear from the case, as reported, that the servant had notice of the bankruptcy. In that case, Chief Justice Lee said: "The point is, whether the defendant is not a tortfeasor, for if he is so, no authority that he can derive from his master can excuse him from being liable in this action." Hughes, the bankrupt, had no right to deliver these goods to Smith; the gist of trover is the detainer, or disposal, of goods, which are the property of another, wrongfully; and it is found that the defendant himself disposed of them to his master's use, which his master could give him no authority to do; and this is a conversion in Smith, the disposal being his own tortious act, the act of selling the goods is the conversion, whether to the use of himself or another, it makes no difference."

*Parker et al. vs. Godin*, (*Strange*, 813,) is a still stronger case. The wife of a bankrupt delivered to a servant plate to sell; the servant delivered it, near the door of a pawn-broker, to Godin, who pawned it in his own name, and delivered the money to the mistress. The assignees recovered damages from Godin, in trover.

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In a post-revolutionary case (in King's Bench,) a merchant's clerk was held liable in trover, for goods which he sent to his employer, although they had been delivered to him for that purpose, and *he did not know* that neither the bailor, nor merchant, had any right to them. In that case, Lord Ellenborough said :—"The clerk acted under an *unavoidable ignorance*, and *for his master's benefit*, when he sent the goods to his master ; but, nevertheless, his acts may amount to a conversion ; for a person is guilty of a conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. *And the court is governed by the principle of law, and not by the hardship of any particular case.*" *Perkins vs. Smith*, (*supra*), *Cooper vs. Chitty*, 1 Burr. 20, and other cases were cited in that case.

In another case, the same Judge said :—"According to Lord Holt, (in *Baldwin vs. Cole*), the ~~man~~ assuming to onesself the property and right of disposal of another man's goods, is a conversion, and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it, *for what is that but assisting that other in carrying his wrongful act into effect?*

In 6 *Modern*, Lord Holt said :—"Any disposing of another's property without his authority, is a conversion."

The foregoing cases and extracts are presented to prove, not only that an unauthorized bailment cannot, according to a general principle of law, exonerate the bailee from legal liability to the true owner, for any injury to the property, or to its proprietor, resulting from the voluntary act of the bailee, but also that the *quo animo*, or motive, is not generally *essential* to his liability for reparation, or restitution, to the person whom, ignorantly or wantonly, he had injured.

The rule thus recognised depends on an obvious principle, sustained, (we think,) by analogy, justice, and authority. It is, that *he*, whose voluntary act, whether *for himself* or another, operates injuriously to the rights of another, shall be responsible to the person who may be injured by the wrongful act. The security of rights—

property itself, would be injuriously affected by the repudiation of a principle so just and so universal.

♣ Possession of a chattel is one *indicium* of title. But a purchaser, or bailee, who, trusting to *that* assurance of title in the possessor, or to his honor, veracity or warranty, must do so at his peril. A purchaser of a chattel from a person in possession without title or authority to sell, will be responsible to the owner for its value even though he had, after paying his vendor a full price, given the property to him. He trusted to the vendor and to his possession, and for so doing, might be subjected to a double loss—the price he gave, and also the value to the owner. He acted on the presumption of title in the vendor, and upon the security to be expected from an express or implied warranty of title. //

The agent who, for hire or otherwise, sells a chattel for another in possession without right, must likewise look to his employer, for indemnity for his liability to the true owner. In assuming the right to dispose of the property, he injures the owner, and acts upon his own responsibility. If his principal be able to indemnify him, he will sustain no eventual loss. If the principal be insolvent, that must be the misfortune of his rash or confiding agent. In that event, it is more just that the agent should suffer the consequences of his own wrongful conduct, (especially if he received a reward for his service and so far acted for his own benefit,) than that the owner, whose rights had been outraged, should be denied any redress. As between the wrong doer, and the person injured, it is not material whether the injurious act was for the benefit of the actor, or for himself and another person, or for that other exclusively; nor is it essential that the actual perpetrator should have known that his authority was insufficient.

♣ Every person who ventures to dispose of the property of another, without his authority, or that of the law, acts injuriously to the owner, and, therefore, in contemplation of law, tortiously. // If A tell B to shoot a horse for him, asserting that it is *his* (A's) horse, and B accordingly kill it, may not C, the right owner of the horse, maintain an action against B, for killing it, without *his*

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Purchaser of a chattel, from one in possession, who had no title, nor authority to sell, is responsible for the value, to the true owner.

An agent, who sells a chattel for one who had no right to it, and is made responsible to the owner, must look to his employer, for indemnity.

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authority? and will B's ignorance of C's right excuse the wrong, or exonerate him from responsibility for the injury? Surely not—such is not,—should not be, the law. If A steal the slave of B, and, whilst in possession, employ C to assist him in carrying the slave to Missouri, and there selling him, may not B sue both A and C, severally, or jointly, for a trespass on his rights? and could C excuse himself by pleading that he was only the instrument of A, and did not know that the slave was not his? Certainly a joint suit might be maintained against A and C, and if the latter should be compelled to pay the whole of the damages, he could not recover contribution from A, unless he could do so on the ground of an implied guarantee.

A sheriff who levies on, and sells, property represented, and believed (without any suspicion to the contrary) by him, to be the property of the def't in the ex'on, but which turns out to be the property of a stranger, is liable to the stranger for its value.

A sheriff, who is not only a public agent, but may also be deemed sometimes an agent of both creditor and debtor, having a *feri facias* in favor of A, against B, levies it, at the request of both of them, on slaves in the possession of B, and accordingly sells them, without knowing, or even suspecting, that any other person than B has title to them. But C afterwards sues the sheriff, in trespass or trover, for selling the slaves, and proves, that, at the time of the sale, he himself, and not B, was the true and exclusive owner of them, may he not recover their value? Indisputably. Neither the good faith, nor ignorance, of the sheriff, nor the combined authority of B, and of the execution, nor all of them united, could exonerate him from legal liability to C, whose rights he had invaded, from whom he had derived no authority,—and as to whom, therefore, he had acted *tortiously* and injuriously. Is there any reason for exempting a mere private, voluntary agent from the like liability for a similar act? We have not been able to perceive any. “*Tortious*” is applied to an act, the offspring, not of accident or of legal or physical necessity, but of sound volition, and which operates injuriously to another person who did not assent to it, and as to whom it was without authority. This is (as we think) abundantly shewn, not only by the more ancient authorities, but by post-revolutionary and unauthoritative cases, from which we have made some quotations, only to prove that the law, as we understand it and



apply it to the facts of this case, has never been shaken, but, even yet, is considered, well established in England, the natal land of the common law.

It does not appear that, in any one of the cases to which we have referred, any stress was laid on the knowledge or ignorance (by the agent) of the true proprietorship. The reasoning, in all of them, tends to shew, that the principle of liability was the want of authority in the constituent.

Though Godin pawned the plate in his own name, it was for the benefit *altogether* of the bankrupt's wife; and it is not stated, nor is it fairly inferrible, that he knew that the plate belonged to the plaintiff, in the action against him. And it appears strange, that, if the fact that the agent was ignorant of the legal proprietorship, would legalize, or excuse, his disposition of the property, all the cases had not stated that the ground of his liability was, that he knew that his employer was not the owner. But not one of them even intimates, that *that* is the only and true ground of his liability; *all* seem to consider the want of authority to be the legal ground.

If an agent receive money for his principal, and pay it over to him, supposing it to be his, *assumpsit* cannot be maintained against him by a stranger who may have been, in fact, entitled to it. The reason is obvious: the law would not imply a promise to pay the money to any one who was not known to be entitled to it.

✓ So a *bona fide* bailee, in possession, may not be guilty of a conversion before a proper demand and refusal. But if he sell the property, whether for himself or his bailor, no demand is necessary by a stranger who is the real owner. The sale is itself a conversion, and is, as to the owner, *tortious* in law. ✓

Now, as the plaintiff in error voluntarily took the slaves of the defendants from their constructive possession, and, without their consent, or any legal authority, carried them to Missouri, and there disposed of them, it seems to us that, according to both law and natural justice, there should be no doubt, that he should be responsible to them, for an illegal interference with their property; and that they should not be compelled to hunt for

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*Assumpsit* will not lie against an agent, who received the money to which a stranger was entitled, and without knowing of the stranger's right, paid it over to his principal — for the law will not imply a promise to pay, where there was no knowledge of the right to receive.

A *bona fide* bailee in possession, may not be liable without a demand and refusal, but from any appropriation of the thing bailed, *tortious* in regard to the owner, and *binding* in *assumpsit*.

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another, whom they may never find, and who, when found, might be insolvent. *The plaintiff's contract with his employer cannot affect the rights of strangers to that contract.* In disposing of the slaves he acted *illegally*, because he had no legal authority; and it cannot be denied that a conversion of the slaves to the use of his principal, was as injurious to the defendants, as a conversion to his own use could have been. Even, it does not appear, that his agency was not beneficial to himself; nor is there any intimation, in this whole record, that he had not, at the trial, the price of the slaves in his own pocket, and a part of it converted to his own use, for compensation. *He must be deemed a wrong doer*, and is, therefore, liable for the property which he detained and converted. As a free agent, he must be responsible for his own voluntary acts, injurious to the defendants and without their authority. *His is a stronger—much stronger case than any of those which have been quoted. In all of them, the proceeds had gone to the principal, before suit brought against his agent.*

In deciding the question of liability in this case, we have referred to other cases and authorities for the purpose of establishing the legal doctrines which apply to the facts as stated in the instruction, and should determine their legal effect. We have not intended to decide other and fictitious cases, which might be imagined, but will not be adjudged until they shall be judicially presented. Nor shall we feel responsible for any misconception, or misapplication, of any authority, or *dictum*, which we have quoted or cited. The principles which govern this case, are well settled and clearly defined. It is not our business to enumerate or classify all other cases to which they should be equally applicable, or those cases of finding or of mere bailment, to which they might not apply.

II. But is *detinue* maintainable? We think it is. Since the case of *Burnley vs. Lambert* (2 Wash. 308,) it has been considered, that proof of possession by the defendant, at the date of the writ, is not necessary in an action of *detinue*. In *Southcote's case* (4 Co. Rep. 83,) *detinue* was

Detinue may be maintained against a defendant who has had possession of the chattel sued for, but has parted

maintained against a bailee (to keep *safely*,) after he had been robbed of the thing bailed.

In many cases it would be difficult to ascertain the motive which induced a defendant to part with the property prior to the institution of the suit for it. And surely the right to maintain detinue, cannot depend on grounds so precarious and delusive as the fact that the defendant was in the possession at the date of the writ, or at the time of its service, or the fact that, in parting with the possession prior thereto, he had acted wantonly or in bad faith. Such a metaphysical enquiry as the latter, seems not to be required by principle or authority, and would, were it required, tend to the subversion of the action of detinue. The plaintiff had rendered himself liable to the action of detinue, by taking and detaining the slaves from the legal owners. Did he, by his own voluntary unauthorized, and therefore illegal act, in selling the slaves, exonerate himself from the pre-existing liability? We think not. If he cannot surrender the slaves, he may be released by paying their assessed value. But for aught this court knows, or the defendants in error can be presumed to have known, or yet to know, the plaintiff may be able to surrender the slaves in obedience to the judgment, and may, perhaps, yet do so. The defendants prefer the slaves to their estimated value. If the plaintiff sold them, he had no right to do so, and passed no title to the purchaser. Why should the defendants be compelled to go to Missouri to sue in detinue? Why may they not maintain detinue against the man, *here*, who took their slaves from this state and detained them, and not only detains them yet, in *contemplation of law*, but may have them *within his power*?

According to the case of *Burnly vs. Lambert*, the fact that the plaintiff was not possessed of the slaves when this suit was brought, cannot change, or affect the remedy, unless he had been "*legally evicted*." This doctrine, if interpreted literally, may be too restrictive. But it seems to be free from just exception, if understood as we suppose it ought to be, to mean that the plaintiff had been divested of the possession in a manner authorized by law, and which would, therefore, exonerate him from

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*with the possession (without being divested of it by authority of law,) before the date of the writ.*

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the charge of tortious conduct. But as his employer could have delegated no more power than he possessed, or could himself have rightfully exercised, his authority to the plaintiff to sell the slaves, did not legalize or excuse that which, if done by himself, would have been a trespass.

No judgment had been obtained against the plaintiff requiring the surrender of the slaves to the person to whom he delivered them ; nor did he deliver them to any person who had a right to demand them, or to whom he was under any obligation whatever to surrender, or to restore them. He voluntarily and illegally sold them ; and consequently, he was not "*legally evicted*," nor did he part from the slaves in a manner authorized or sanctioned by law. And we are, therefore, of the opinion that the action of detinue may be maintained against him, even though he had been ignorant of the right of the defendants when he sold their slaves. It is a general rule that whenever trover may be maintained for the conversion of a chattel, detinue may be maintained between the same parties, if the chattel be susceptible of identification and restitution. And we perceive no sufficient reason for excepting his case from the general rule.

An innkeeper, who receives the horse of a guest (as he is bound to do,) merely to shelter and feed him, is not answerable to the true owner of the horse.— But by the sale, exercise of control over, or detention of, the horse, without the sanction of the owner, the innkeeper would be rendered liable.

We have been asked by the plaintiff's counsel, whether an inn-keeper who, in good faith, had received into his stable and fed a horse, for and at the instance of a guest who was the ostensible but not the true owner, would thereby subject himself to an action of detinue by the owner ? We answer *no* ; because he would not be liable in any form of action. Nothing which he did, should be deemed wrongful or illegal. It was his duty to receive the guest and the horse which he rode, and to furnish shelter and food to both the man and the beast, if requested to do so. Even the possession of the horse whilst *thus* in the stable of the inn, should be deemed to have been in the guest, and not in the host ; and, of course, the latter would not be liable to trover or trespass. But had he detained the horse for his bill, and thus exercised dominion or proprietorship, or had he sold, or otherwise converted the horse without the sanction of the true

owner, he would have been liable to him, in trespass, trover or detinue, according to circumstances.

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Many other fictitious cases might be stated, for exemplifying the principle of legal liability, by which this case must be tested. But further illustration is deemed superfluous. This is a well defined case. It is not obscured by the twilight near the line separating cases of liability from such as are not governed by the same principle: and it cannot be excepted from the full and decisive operation of the principles recognised and established by some of the foregoing, and many other similar authorities.

It does not become necessary now to decide, whether or not the plaintiff could have been made liable to his employer for the nonperformance of his undertaking to sell the slaves, if instead of selling, he had delivered them to the defendants; nor whether or not this action could be maintained against him, had he, instead of selling, restored the slaves to his bailor. He did neither of those things; but by the asportation and sale, did an injury to the plaintiffs, for which they had a right to hold him responsible, in trespass, trover, or detinue.

*Trespass, trover, or detinue, will lie against him who carries away and sells the property of another without his assent.*

It may not be improper to suggest, that Story, in his treatise on bailment, shews that, if detinue had been brought against Pool whilst he was in possession, he could not have exonerated himself by restoring the slaves to his bailor, any loose dicta in Rolle, Bacon, or elsewhere, to the contrary notwithstanding. But that point is not involved in this case.

Wherefore, it is the opinion of this court (Judge Underwood dissenting,) that the judgment of the circuit court be affirmed.

Judge UNDERWOOD, dissenting from the views of the majority of the Court, in this case, delivered the following Opinion:

*Judge Underwood's Opinion.*

THE opinion just delivered, maintains it to be law, that an agent, or bailee, who receives a slave, and parts with the possession, according to the terms of the trust, without any knowledge that there is any paramount title to

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that of his bailor, is responsible to the true owner, for the value of the slave and his hire from the time process was served.

I am opposed to the doctrines of the opinion, because I believe they misapply, or overturn, principles which have been long recognised, and introduce a new rule, which, so far as I can foresee, will bring about a state of distrust and suspicion, tending to destroy the courtesies of life, and to clog the business transactions of society.

A man receives a jewel from his friend, and promises to deliver it to his friend's wife or daughter ; or he meets with a person driving cattle, horses, or hogs to market, who is sick and cannot proceed, and he engages to take charge of the drove, proceed with them, make sales, and return the money to the drover ; or he engages to transport produce by land or water, and to sell it, or to deliver it to a designated person ; and he performs the trust in good faith, without knowledge that any one has title to the property delivered to him, paramount to him from whom he received it ; he will, nevertheless, under the opinion delivered, be compelled to pay the true owner the value of all the property which has thus innocently passed through his hands.

The doctrine of the opinion amounts to this : that an agent, or bailee, who receives goods into his possession from his principal, thereby incurs the same liabilities to the true owner, which his bailor was under ; and that this liability continues, although the agent, or bailee, may have parted with the possession according to his contract, without knowledge of the adverse claim. The bailee is thus made surety for the bailor, and must answer for all his wrongs. If benevolence incline him to receive and sell an article from the head of a sick family, and to purchase necessities for their use, his kindness is taxed with the full value of the article in favor of the true owner. His ignorance and the purity of his motives are no shield.

In my researches, I have found no law which, in my opinion, sanctions a doctrine so incompatible with, what seems to me to be, the dictates of natural justice and sound morals. On the contrary, the law, as laid down

in several elementary books and adjudged cases, is fully up to the point against it.

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In *Bacon's Ab. Title, Bailment, D.* it is said : " If I deliver goods to B, and C, that hath right, demands them of him, if B, either before or pending the action, deliver over the goods to me, this is a good bar to the action of C, brought against B ; for since B hath undertaken to deliver the goods back to me, *he shall not be chargeable for the honest performance of that undertaking* ; for B, that is trusted with my possession, shall not remove or alter my possession, and, therefore, shall not be put to answer for that to which *the law obliges him.*" In support of the text *F. N. B. 138, Roll's Ab. 607, and 2 Bos. and Pul. 462*, are cited. Here it is expressly laid down, that the bailee may discharge himself from the action of the *right owner*, by restoring the goods to his bailor pending the action. Were I to concede that this was going too far, yet where the restoration takes place before the action of the right owner is commenced, and before notice to the bailee of the paramount title, I cannot perceive the slightest grounds for holding him liable. The reason against liability in such case, is, the law obliges the bailee to restore the possession, because it is his contract to do so. It would, therefore, be iniquitous in the law to give damages against a man for doing that which is enjoined as a legal duty. The bailee cannot set up an outstanding title to justify withholding the possession from the bailor. If he could, he would thereby change the bailor's possession, and put an end to all faith in contracts of bailment. The bailee is estopped to deny the title of his bailor. The case of *Stephens vs. Vaughan, 4 J. J. Marshall, 207*, fully supports this view of the subject. It is there said, " the bailee cannot deny the right of his bailor, unless he can shew that it had been ascertained *judicially*, that some other person had a right to demand restitution ; or unless he could prove that some other person, having a better right than his bailor had to the property, *had taken it* from him without his fault." That case maintains the position, that nothing can exonerate the bailee from the action of the bailor, but the judgment of a court, recaption by the right owner, " in a pro-

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per manner," which "is virtually the act of the law," (to use the language of the case,) or the act of God.

If the bailee agree to deliver the property put into his hands to another, or agree to sell it for the use of the bailor, and pay over the money, why shall he not be held "to the honest performance of his undertaking" in such cases, just as he is when he receives the property to keep safely? I cannot perceive a shadow of difference between the cases in principle. If he does perform in good faith, the reason to exempt him from liability to the true owner, is just as strong as it is in the case where he receives the property to keep for an hour, and then restores it to the bailor, without knowledge of any adverse claim. *Jones on Bailment*, (recent edition) page 51, contains a reference to the code of Napoleon, for the purpose of shewing that the bailee who receives property to sell for his bailor, and does it, is entitled to the same protection as though he received it for safe keeping only, and restored it in good faith to the bailor. That code is not authoritative here. But it shews that enlightened France has adopted the principle, which I think sanctioned by English jurisprudence, and eminently conducive to the convenience and prosperity of every civilized nation. It is highly important, in my judgment, to encourage contracts between bailors and bailees, principals and agents; or rather not to discourage them, by imposing onerous burdens on bailees and agents, when they perform their trusts in good faith, without knowing of, or intending to interfere with, the rights of third persons.

In considering the facts of this case, my brethren have arrived at the conclusion, that the conduct of Pool should be regarded in the same light, as if he had admitted, that he had not paid over to Carlton, the money which he received for the sale of the slaves in Missouri, because "there is no evidence that he ever made such payment." I cannot consent to the propriety of the conclusion; nor do I perceive, if it were correct, how it could essentially change the character of Pool's defence. There is no evidence that he ever received any money. Whether he sold for cash in hand, or on credit, is not stated. If it can be inferred that he sold for cash in hand, then the legal infer-



ence from the facts should be, that he had paid over the money to his principal, because it was his duty to do so. The presumption of law is, that he performed that duty, until the contrary is made to appear by evidence. The *onus* devolved on the defendants in error. They proved Pool's confessions, and from them it appears that he was employed as an agent, by Edward Carlton, who had brought the slaves from Virginia, claiming and exercising acts of ownership over them, to carry the slaves to Missouri, and sell them ; and that he received the slaves from Carlton, "carried them to Missouri, and had there disposed of them, as agent for said Edward Carlton, and had no longer the possession of said two negroes, and did not then know that the plaintiffs had any claim to the said negroes."

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Suppose Pool had failed to pay over the money to Carlton, and that the latter had sued him for it, could he resist a recovery upon the ground that Adkisson and Toote were the right owners of the slaves ? He certainly could not, unless he should be allowed, contrary to the authorities cited, to set up a title in strangers, against his bailor. But concede that he might set up such title, still, if he was as ignorant of it upon the trial, as he was when he sold the slaves, he could not make such a defence against Carlton, and the consequence would be, that Carlton would recover a judgment for the money. How then would matters stand ? Carlton would compel Pool to pay his judgment, which would be no defence against Adkisson and Toote ; and they, under the doctrines of the opinion delivered, would thereafter recover of Pool, the value of the slaves and hire for their detention ! Thus Pool is made to pay twice. After he pays Adkisson and Toote, can he recover the amount of their judgment from Carlton, in the face of the judgment in Carlton's favor ? Or what remedy shall Pool have for the injustice and ruin which he innocently suffers ? I confess I cannot answer these questions satisfactorily. Pool ought to be redressed ; but I leave the form and nature of his action to those who shall place him in the difficulty. I fear, however, that he can have no redress under the doctrines of the opinion ; for that says, by the "as-

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portation and sale of the slaves he did an injury to the plaintiffs, for which they had a right to hold him responsible, in trespass, trover or detinue." Now, if Pool be a trespasser, he is certainly a joint trespasser with Carlton, and it would be directly in violation of the principle, that one trespasser shall not have contribution from another, to let Pool recover from Carlton, where they have jointly trespassed on the property of Adkisson and Toote. It should be kept in mind, that the motives of Pool, and his ignorance of the rights of Adkisson and Toote, are not allowed by the opinion to operate in his favor against them. How are they to benefit him when he comes to litigate the matter with Carlton? But take it that Pool is a separate, and not a joint tortfeasor, can he call upon Carlton to pay him for his own tortious conduct, and thereby take advantage of his own wrong?

To constitute an injury for which the law gives a remedy to the party aggrieved, there must be, either a violation of a contract, or a *tort* perpetrated. There is no pretence for contending that Pool has violated any contract. There is as little, in my opinion, for saying that he has been guilty of a *tort*. Carlton had possession of the slaves. The deed of trust which he had executed in Virginia, to the defendants in error, was unknown. Carlton's possession was *prima facie* evidence of a good title. In the absence of all knowledge of the deed of trust, actual or constructive, the law authorized Pool and all others to regard Carlton as the true owner. Was it a *tort* to receive the possession from him who was the equitable owner, and who, *prima facie*, held the absolute title? I think it could not be a *tort*, for if it was, then the restoration of the possession to Carlton, could not discharge Pool from the action of the right owners, as is clearly proved by the authorities to be the law. The *taking* possession, from him who was possessed in fact, was, therefore, a lawful act on the part of Pool. If a man finds a runaway slave, or inanimate property, it is well settled that he may *take* the property, and keep it for the true owner. If he can *take* property which he knows does not belong to him, when he finds it in the actual possession of no one, but yet in the constructive possession of

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the right owner ; how is it unlawful for him to take possession of property, which the true owner has lost, from the individual who has it in actual possession ? The only difference in the cases is this, where he finds property not actually possessed by any one, and takes it, he holds as the trustee of the right owner ; but where he receives the property from one actually possessed under a contract of bailment, then he holds for his bailor, and the law binds him to be faithful to his bailor and his title. In either case, the act of taking is lawful, and not tortious.

In torts the *quo animo* may give character to the transaction, and is an important consideration. If I enter upon the land of A, having lawful business to transact with him, it is no trespass. If I make the same kind of entry without lawful business, it may be a tort. Testing the conduct of Pool by the *quo animo*, he is guiltless. The law invited him to regard Carlton's possession as evidence of right. He acted upon the inferences which the law justified him in making, from the facts. I cannot consent that the law shall set snares, and make victims of those who trust in its presumptions.

The possession of the bailee is not an independent, adverse possession. It is the possession of the bailor. In regard to real estate, it has been over and over again settled, that the possession of the tenant is the possession of his landlord. There is as much reason for applying this doctrine to chattels, between bailor and bailee, as to lands. If a thief requests me to hold the bridle upon a stolen horse, until he warms his fingers, or takes a drink, will I thereby become possessed of the brute, and incur a liability to the true owner for its value ? If, as auctioneer, I should ride the horse up and down the street, cry him for sale, knock him off to the highest bidder, receive the cash and pay it over to the thief, deducting a commission, do I thereby make myself responsible to the true owner, of whose rights I am altogether ignorant ?

In these, and all similar cases, I look upon the possession of the bailee, agent, or servant, as the possession of the bailor, principal, or master. Their title is identical, except that the bailee &c. hold in subordination to him from whom the possession is received. The possession

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in fact may be changed, but the possession in law remains the same, and continues with the bailor &c.

If the tenant of the freehold pays rent to his landlord during his occupancy, and then leaves the premises, restoring the possession to the landlord, who is thereafter evicted, I deny that the successful claimant can have his action against the tenant for the *mesne* profits. The reason is, that the tenant paid his rents in discharge of a contract which legally bound him, and having done so, cannot be again charged for the same thing. The same rule should apply to the bailee who honestly performs his contract in respect to a chattel.

If Pool did not act tortiously in *taking* the slaves, he is not liable, unless he thereafter acted tortiously, in converting or disposing of them. I will now endeavor to shew, that he has not acted *tortiously* after the slaves were put into his hands. If the *taking*, or reception, was lawful, when did the *tort* thereafter commence? Was it when he carried the slaves across the state line into Missouri? If he had carried them to Virginia and delivered them to the defendants in error, would such removal from Kentucky have been tortious? I can perceive nothing more in the removal of the slaves out of the state, than there is in removing them from one farm to another in the same county. But perhaps it is the sale made by Pool, that constitutes the *tort*. If he had not sold them he would have violated his contract with Carlton, and could not avoid paying damages to him for the breach, unless he could resist by shewing the paramount title of the defendants in error, which, as we have already seen, he could not do. If the sale makes the tort, and renders him liable to Adkisson and Toote, the dilemma may result in his ruin, and there is no escape. I hold that the sale is not tortious on the part of Pool. It was not his act, but the act of his employer Carlton. As the agent merely, Pool was bound to transact the business in the name of his principal. If he did so, the purchaser could look to Carlton only, and Pool would incur no personal liability to him. Upon what principle is it, that he incurs a personal liability to the right owner, whose title is unknown? If there be any principle which creates such

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liability, it must be found in the conversion of the property to the use of Carlton, or to his own use. I will endeavor to shew that Pool has done neither of these things.

*First.* He did not convert the property to Carlton's use, for Carlton had done that himself, by illegally removing the slaves from Virginia, and by the very act of employing Pool to take them off and sell them for him. Unless, therefore, a man by employing a dozen agents, after he has fully converted property to his use, may have it twelve times re-converted to his use, by the action of these different agents, Pool has been guilty of no wrong in converting the slaves to Carlton's use. A conversion once complete, cannot be made more wrong, or be changed into new and distinct causes of action for every use of the property inconsistent with the right of the true owner. If I convert the ox of my neighbor to my use, and thereafter, I employ a driver to work him for me, or a butcher to slaughter him, these agents commit no new offence. I had fully converted the property to my use before they had any thing to do with it, and nothing which they can do will add to the *tort* which I have already fully consummated: It might as well be said, that every time a man rides a horse which he has illegally converted to his use, that he thereby commits a new and distinct offence, for which a separate action of trover might be maintained against him, as to contend that if he lends the horse to A, hires him to B, and employs C, D and E to work him, that they are all new *tortfeasors*, and liable to the right owner for the value of the horse. I regard the persons who thus use the property under authority from the individual who has converted it, as in no way partakers of the original wrong, unless they know that their bailor is trespassing on the rights of another. It is certain, that in point of morality, they are not guilty. Why then make them guilty under the law?

*Secondly.* Pool has not converted the property to his own use. There is no evidence that he made any profit by the use of it; or that he attempted to do so; or that he claimed the slaves as his own; or that he assumed upon himself any right to control the slaves, except as

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the agent of Carlton. When a man thus disclaims all right in himself, and is, in good faith, acting for another, from whom he received the possession, there is no pretence for alleging that he converts the property to his own use. A son under age cannot excuse himself from a *tort*, upon the ground that he acted in obedience to the commands of his father. If the father tortiously takes a horse, and leads the horse to his house, and directs his infant son to feed and work the horse, and he obeys, does he thereby become a *tortfeasor*, and liable to the true owner in trespass or trover? I think not.

The opinion delivered, looking upon Carlton as having no right to the slaves, says, "he who has no legal right to do a thing, cannot delegate authority to another to do it. The power of an agent, being altogether derivative, cannot exceed that of his principal," &c. &c. These obvious truths, in my opinion, have no application to the present case. I am not contending that Carlton could give powers which he could not himself exercise. I know that Pool cannot set up a license from Carlton to justify him in doing wrong. The error of the opinion consists, I think, in confounding or uniting Carlton and Pool, and making the latter guilty because the former is. My effort has been to take a distinction between them. If there be none, I admit that Pool is guilty. Carlton did not pretend to delegate power to Pool, authorizing him to sell the negroes of Adkisson and Toote, or to carry their slaves out of the state. If the letter of attorney had shewn such objects upon its face, Pool, knowing the law, must have known, that it could not authorize him to do such acts. Carlton's power of attorney purported (we must presume it was formally executed,) to authorize Pool to sell Carlton's slaves. Now, if Carlton delivered slaves belonging to the defendants in error, to be sold as his, under such a power, I admit that the power would not enable Pool to pass the title of Adkisson and Toote. Why? Because Carlton could not do it himself, and hence, could not create an agent whose powers exceeded his own. But it does not follow from the law, which restricts the agent to the same powers his principal possesses, that if the

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principal commits a trespass, or tort, in taking property from the true owner, that the agent is equally guilty, if he innocently receive the property as bailee from the principal. I cannot apply the old adage, that the receiver is as bad as the thief, unless the receiver knows of the theft. It is making the bailee who neither aids nor abets, nor attempts to conceal, answerable as accessory, or as co-principal, for wrongs which never entered into his contemplation.

The best definition of bailment which I have found, is in *Jacobs' Law Dictionary*. Leaving out the addition to it of Sir William Jones, it is, "a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be faithfully executed on the part of the bailee."—I find nothing said about the bailee being a *tortfeasor*, if the bailor is. On the contrary, the very definition shews, that the bailee is bound to perform his trust. If the contract is entered into by the bailee in good faith, the law which authorizes him to enter into the contract, protects him in the faithful execution of it. Pool's justification is, therefore, derived from the law, and does not at all depend on any authority derived from Carlton. If a court of chancery appoints a trustee (*a mere bailee*), and directs him to sell property, supposed to belong to the litigants, but which does not, and they deliver it to him, and he sells it, is he responsible to the true owner as a trespasser, or for the conversion? Why shall the chancellor's agent be more favored than the agent of a private individual? The law equally authorized them to assume the trust confided to them, and each acted voluntarily in undertaking to perform.

I am willing to admit, as a general proposition, that where the conduct or acts of a man produce a loss or destruction of property, he is liable to answer in damages to the party aggrieved. But there are many cases, where the person, who, directly and immediately, by his acts, inflicts the deepest wounds which life, liberty and property can sustain, is not responsible to the sufferer. The ministerial acts of the officers of the law are of this description. The sheriff who imprisons the body, or strips a man of all his property, is not responsible, if it should

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turn out to be a malicious prosecution. The judge may erroneously deprive a man of his liberty or his property, and yet there may be no redress. But if executive, or judicial officers act corruptly, and knowingly abuse their powers, to the injury of any one, then the law will charge them with the consequences, and afford a remedy against them. I may employ a man to transact my business, and leave him to his own judgment in performing it. His conduct may involve me in losses, even to bankruptcy, and still I may not be entitled to redress. If he acted in good faith, I must bear the loss. The law does not sanction the idea, without exception, that every loss brought upon us by the conduct of others, is an injury. The law says, there is such a thing as *damnum absque injuria*. It is not sufficient to convict Pool of a *tort*, to shew only that Adkisson and Toote sustained a loss from his conduct.

I concede that, if Pool had made an absolute purchase of the slaves, and had sold them on his own account, he would have been answerable to the true owners. The reasons for liability in such a case, are very obvious. Every man who purchases property and takes possession, thereby converts it to his own use. His possession is, thenceforth, adverse to all the world. If the purchase be of a chattel, there is a warranty of title, resulting from the mere act of selling, and the purchaser takes the thing, subject to the claims of others who may have better right, relying on the warranty for indemnity against paramount titles. The case is very different here. Pool made no purchase, did not convert the property, did not hold adversely, and did not accept the slaves under any warranty.

*Starkie*, Vol. 3. 1494, says, that, "in general, evidence of some tortious act is essential to a conversion." In page 1497, he says, "this proof (to-wit, a demand and refusal) is always necessary where the goods came lawfully into the defendant's possession, as by finding, or upon bailment, or delivery of the owner; but it is unnecessary where a tortious taking of the goods can be proved." The inference to be drawn from the text, is very strong, that every reception of goods in good faith by a



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bailee, from the possessor, is lawful. To make it *tortious* a demand and refusal must be proved. Every refusal will not convert the lawful possession into a *tort*. *Starkie*, 1499. When the bailee has restored the possession, or performed his trust by parting with the property, he cannot comply with the demand; and hence no presumption can arise from his refusal, that he has converted the property. It may be proved, that he has not, as in this case, by shewing the manner in which the trust has been discharged. If the bailee has been guilty of no *tort* up to the time of the demand, it seems to me to be impossible to make him a *trespassor* for failing to comply with the demand, when his inability results from the punctual and faithful performance of his contract before notice of any adverse claim. If there be a conversion, it can only be in those cases where the bailee used the property while he possessed it, and made profit out of it. In these cases, after he has restored the property, the conversion, at most, can only be *partial*, and the bailee should, in no event, be required to account to the true owner for more than the value of the service of the slaves, or the horse, for the hour, or the day. I do not admit he would be accountable for that, because he intended no wrong; because the law authorized him to presume the bailor had title; because he came lawfully into possession, under a contract of bailment, and only used the property as stipulated for in the contract, and because his acts as bailee are the acts of the bailor. In cases of hiring, the bailee pays an equivalent to the bailor for the service. What difference can it make to the right owner, whether his slave worked for the tortious bailor, or innocent bailee? If the bailee did not hire the slave, the bailor would keep him at work: how then has the bailee injured the right owner?

The opinion delivered seems to regard the motives and intentions of the bailee as matters not to be considered. In the case of *Kennet vs. Robinson*, (2 J. J. Mar. 87,) motives were directly considered; and much stress put upon them. There is a long quotation from Lord Ellenborough, made for no other purpose than to shew, that where the motive is charitable and kind, and there

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was "no intention to injure the property, or to convert it to the use of the taker," it could not be deemed an "illegal conversion." That case fully recognises the doctrine quoted from Starkie, and it decides that the use of the horse ("*Old Jolly*,") and lending and hiring him under the bailment, was not an *illegal conversion*. It is as proper, in my opinion, to consider the motives of a bailee, as to regard the motives of a kind nurse, who, under the directions of a murderous physician, administers arsenic, for calomel. The nurse is innocent: the physician is a murderer.

The opinion delivered concedes, that the doctrine for which I contend, is correct so far as it concerns innkeepers; because as is said, "it was the innkeeper's duty to receive the guest and the horse which he rode, and to furnish shelter and food to both the man and the beast, if required to do so." If the law did not enjoin this duty, then we must infer from the reason assigned, that the innkeeper would be liable. Take the case then of a private hospitable country gentleman: Shall his hospitality be the cause of compelling him to pay for every horse, which tortious knaves may find means to introduce into his stables? Is the owner of every stallion in the country, now extensively engaged in breeding and raising horses, responsible to the true owner for the value of every mare bailed to him, and which the bailor may not own? I deny that an innkeeper is under any obligation to receive and entertain a thief and the horse he rides, knowing him to be such. With such knowledge, it is the innkeeper's duty to put the thief in jail, and secure the horse for the owner, by instituting proper legal proceedings. But conceding that it was his duty to receive and entertain those who are not known to be guilty of crimes, and who yet introduce a stolen horse, which the innkeeper feeds, then according to the opinion delivered, if the innkeeper "detain the horse for his bill, and thus exercise dominion or proprietorship" he is liable to the true owner "in trespass, trover or detinue, according to circumstances." This is not the law, if Bacon can be trusted. He says (*Title Inns and Innkeepers*, D.) "If A injuriously take away the horse of B, and put him

into an inn to be kept, and B come and demand him, he shall not have him until he hath satisfied the innkeeper for his meat." *Yel.* 67. 3 *Buls.* 269, 270. 2 *Rol. Ab.* 85. *Poph.* 128, 179, and 2 *Lord Raym.* 867, are cited. I think the law as laid down in Bacon better comports with reason and good policy than the position assumed in the opinion delivered. It shews clearly that there may be at least one case, where the bailee coming into possession under a tortious bailor, may acquire rights which his bailor did not possess, and that he does not stand upon the same footing with the bailor in respect to the right owner.

*Paley on Agency*, 317, speaking of an attorney at law, says: "Even if he sues for a debt which he knows to be released, and was himself witness to the release, yet it has been held that no action lies against him." Here is a case where the agent knowingly assists in the perpetration of a wrong, and yet, from considerations of public policy in regard to a useful profession, his acts are only considered as the acts of his client. I should be averse to sanction a principle which lets the designing, knowing perpetrator of a wrong escape. But, surely, if a lawyer may hide himself under his client's cloak, when he acted with full knowledge, an innocent agent, after performing his trust in good faith, may say to the injured party, "it is my principal, and not me, that has wronged you."

The opinion delivered puts this case: "A tells B to shoot a horse, asserting that it is his. B kills the horse, which turns out to be the property of C. May not C recover from B, as a trespasser?" The case put is not distinctly stated, in such manner as to enable me to say on which side the line it is, that I have kept in view in forming my opinion. If A was not in possession of the horse, I admit that B would be a trespasser on the rights of C. In that case, the law would apply which discountenances the idea of allowing a man to confer a right on his agent, to do a thing which he could not do himself, and the agent at his peril would meddle with property not possessed by his principal. But if the horse was in A's possession, if he had converted the horse to his use,

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and then told B to shoot him, because the horse was crippled and would speedily die in all probability, and B did so to end his pain, I should decide that B was no trespasser. By the conversion, A's possession is adverse to B's title, and B cannot complain of those who innocently, and from good motives, do no more than what the possessor directs. Suppose a farmer calls on his neighbor to assist him in killing his pork, and the neighbor butchers a hog found in the pen, not owned by the farmer, but which he has fraudulently converted before that time—who shall pay the right owner? I think the farmer alone is bound.

The opinion puts the case of a sheriff who levies an execution, at the request of the plaintiff and defendant, on the property of a stranger in the defendant's possession, and asks if the stranger may not recover from the sheriff in trespass or trover? I answer, that the sheriff's authority, in the execution of his official duty, is derived altogether from the law, and cannot be enlarged by attempts, on the part of individuals, to confer authority upon him. Under the law, he levies executions at his peril, and the law gives him no authority to take the property of any one but the execution defendant. The taking is never in the character of bailee; his possession of goods when taken is not subordinate; is not the possession of another; it is all his own; and if he performs acts which are without legal sanction, as he is bound to act upon his own judgment, he will not be excused by setting up authority from individuals, in opposition to his powers derived from his official station. Were I to concede the liability of the sheriff in the case stated, I could perceive no analogy in it to the case of Pool. But if it could be shewn that the sheriff had a right to throw off his official character, and to become the private agent in the transaction, of the plaintiff and defendant in the execution, to sell property which the defendant had converted to his use, but which rightfully belonged to another, and to pay over the proceeds of the sale to the plaintiff, and that he performed his trust in good faith, without knowledge of the stranger's rights, I am of opinion that he would neither be responsible in trespass,

trover or any other action. The case would then be like that of Pook.

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The doctrine of the books, which in general subjects the servant, or agent, to damages, as a *tortfeasor*, when acting under the command of the master, or principal, applies to those cases only where the law puts the servant, or agent, on his guard, and enables him to ascertain, by inquiry, whether he can act with safety in obeying the command. It never ought to apply, and I have seen no adjudged case where it was made to apply, to the conduct of a servant, or agent, who, *bona fide*, received the goods from the possession of the master, or principal, and disposed of them according to orders.

I shall hasten to the termination of a dissent already tedious, by noticing the decisions referred to in the opinion delivered.

The case of *Rex vs. Almon*, 5 Bur. 2687, throws no light on the subject. It was a conviction for publishing a libel. The question was whether a sale of the pamphlet, in the defendant's shop, by his servant, was *prima facie* evidence of the defendant's guilt. The court decided that it was. If the prosecution had been against the agent, or servant, perhaps the judges might have said something bearing on this case.

*Bristol vs. Burt*, 7 Johnson, 254, was an action of trover, brought to recover ninety five barrels of pot ashes, which Burt, as collector of the port of Oswego, under pretence of preventing a violation of the embargo act, undertook to control, by employing armed men to guard the property, and prevent the plaintiff and owner from removing it. The court correctly determined that the dominion thus assumed amounted to a tortious conversion. The defendant's conduct invaded, and was altogether inconsistent with, the plaintiff's right of property and possession, and he knew it.

*Shotwell vs. Few*, 7 Johnson, 302, was an attempt by Few, as inspector of a prison, to detain the goods of Shotwell, against light and knowledge, under pretence of a lien on them, to secure a debt due the institution.

*Murray vs. Burling*, 10 Johnson, 172, was a breach of trust and a fraud practised by the defendant, in convert-

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ing the plaintiff's property, to wit, a note of hand delivered to the defendant, to enable him to raise money for the plaintiff's use.

The case in 1 *Wilson*, 328, is this. On the 22d September, 1749, Hughes became a bankrupt. On the 23d of September, 1749, Smith, the defendant, the servant and riding clerk of Garroway, to whom the bankrupt was considerably indebted, went to the bankrupt's shop to try to get his master's money, and found it shut up. The bankrupt delivered to Smith the goods, who receipted for them in his master's name, and sold the same for his master's use. The assignees of the bankrupt sued Smith, in trover, for the goods, and recovered. It was objected, that they should not recover against Smith, because he was servant, and acted wholly for his master. Lee C. J. said: "The point is, whether the defendant is not a *tortfeasor*; for if he is so, no authority that he can derive from his master, can excuse him from being liable in this action." He then proceeds to shew, and I think correctly, that Smith was a tortfeasor. Smith took the goods from the bankrupt, knowing his bankruptcy, and it does not appear from the case as reported, that his master gave him any authority to receive the goods, or to sell them. He therefore, acted upon his own judgment and responsibility, and was the mover in the wrong. If his master had converted the goods, by receiving them from the bankrupt, and Smith had without knowledge of it, as the clerk and agent, sold them to his master's customers, I think it would have presented a case entirely different, and analogous to the present.

The post-revolutionary cases decided by Lord Ellenborough, whose opinions are copied, are to this effect: Deane purchased goods from the bankrupts for Heathcote, who was in America. Deane gave information to Elwall, the clerk of Heathcote, of the purchase, on the day it was made. The goods were afterwards delivered to the defendant, Elwall, and he disposed of them by sending them to America, to Heathcote. Stephens &c. assignees of the bankrupts, recovered in trover against Elwall. His *lordship* speaks about the clerk acting under "an unavoidable ignorance, and for his master's benefit,"

and still convicts Elwall of a tortious conversion. But of what he was *unavoidably ignorant*, which should cut any figure in the cause, I cannot learn from the facts reported. It does appear that Elwall was told of the purchase by Deane, on the day it was made, and it does not appear that Deane delivered the goods to Elwall. He may have received them from the bankrupts, and it is not probable that Deane failed to tell him from whom the goods had been purchased. Be these things, however, as they may, it is certain that the case is very unlike the present. Heathcote, the master, was in America; never had possession of the goods, and gave no directions about them. If a man sends an agent out in the world to purchase goods for him, and gives no other instructions, the agent's authority is limited to obtaining such goods as the vendor may lawfully sell, and if the agent receives any other kind, he does it at his peril. I see no resemblance in the cases. The other case, to-wit, *McCombie vs. Davies*, in 6 East, 538, bears no analogy to the present. There Coddan purchased tobacco for McCombie, and afterwards pledged it to Davies, for an advance of money. Davies refused to surrender it to McCombie, unless he would pay the money advanced; and set up a lien under the assignment of Coddan. Ellenborough C. J. convicted Davies of a conversion, very properly, upon the authority of the case of *Baldwin vs. Cole*, 6 Mod. 212.

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The words, that, "he who assumes upon himself the right of disposing of another's goods" is guilty of a conversion, were first used by Holt C. J. in the case of *Baldwin vs. Cole*. The facts of that case were these: "A carpenter sent his servant to work at the Queen's yard for hire, and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue till the Queen's work was done." Holt said, "the very denial of goods to him that hath a right to demand them, is an actual conversion; for what is a conversion but an assuming upon oneself the property, and right of disposing, another's goods." I apprehend that the learned judge never contemplated applying his ex-

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pressions to the case of a bailee who had honestly performed his engagement.

The facts of the case of *Parker vs. Godin*, 2 *Strange*, 813, are, "Satur, a bankrupt, at the time of his going off, left some plate with his wife, who in order to raise money upon it, delivered it to her servant, who went along with the defendant to the door of Mr. Woodward, the banker, and there the defendant took the plate into his hands, and went into the shop and pawned it in his own name, gave his own note to repay the money, and immediately upon the receipt of it, went back to the bankrupt's wife and delivered the money to her." To my mind there never was a clearer case of tortious conversion than this. *Godin*, with full knowledge of all the facts, for he started from the house with the servant and went back to it, converted the plate to his own use. How he appropriated the money after he got it, was immaterial. He pawned the plate as *his own*.

The facts of the cases explain the general declarations of the judges and elementary writers. The present case, in my opinion, is unlike those which are referred to in point of fact, and therefore, I cannot admit the propriety of applying expressions used in reference to facts of a different nature, to the circumstances attending the bailment in the present case.

Ignorance of the law will excuse no one. This principle results from political necessity. But ignorance of facts in many cases will furnish a complete shield to a defendant who would not be otherwise protected. Thus if a purchaser of land knows of a subsisting equity at the time of his purchase, he will be compelled to surrender his legal title; if he had no such knowledge, and be a purchaser in good faith, he may retain the title. All the doctrines of notice, which embrace a variety of heads, are based upon the idea that many of our most important rights depend upon our knowledge, or our ignorance of facts.

*Comyn on Contracts*, 1 Vol. 243, shews that ignorance on the part of the vendee of the character of the factor, may make a difference in favor of the vendee. It is laid down in note (i,) *Paley on Agency*, 315, that "if the master



look a man into his house, and deliver the key to his servant, if the servant be ignorant that any body be there, he is not chargeable; but if he knew that the master had imprisoned one tortiously, and he still kept him in prison, he is liable to an action. This is a striking case to illustrate the difference between acting *ignorantly*, and *knowingly*. The same note cites *Roll. Ab.* 95, to shew that a servant who sells wine that is corrupted, knowing it to be so, is not liable, merely because he did it as a servant. A note in page 316, *Paley on Agency*, refers to the case of *Mires vs. Solebay*, 2 *Mod.* 242, where it is said to have been expressly decided, that trover would not lie against a servant for an *unlawful* intermeddling with the goods of another by command of his master, unless it amount to a trespass. I have not examined the facts of the case, but the principle established by it shews, in opposition to the doctrines of the opinion, that the servant and master stand on different ground. I have not had access to Roll's Abridgement, and could not examine the references the opinion makes to it. An agent who receives money through mistake, and pays it over before knowledge, or notice, of the mistake, is not answerable. If he pays it over after notice, he is. 1 *Comyn on Contracts*, 250. So that I find no doctrine of the law better established than that which makes the knowledge or ignorance of facts, the essential point upon which important rights depend. My brethren have refused to inquire into the motives, or the extent of Pool's knowledge. I think the inquiry would have been important, connected with the other facts, in his behalf.

The note (1) in 2 *Saunders*, 47, contains a reference to many cases, shewing what will amount to a conversion. The cases in 1 *Wils.* 328, 2 *Stra.* 813, and 6 *Mod.* 212, are there referred to, and the principles extracted from them by *Williams*, meet my approbation, and do not conflict, I think, with the views I have taken of this case. Indeed, I find in that note a strong confirmation of my opinion. It is there said: "Another ingredient of this action is, that there should be a *conversion* by the defendant; as to which it is a common learning that where the goods come into the defendant's possession by de-

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livery or finding, the plaintiff must demand them, and the defendant refuse to deliver them up, in order to constitute a conversion ;” and he cites 1 *Sid.* 264, and *Bull. N. P.* 44. Buller says, if the goods come to the defendant’s hands, “by delivery, finding, or *bailment*, an actual demand and refusal ought to be proved.” And *Williams* says, in the aforesaid note, that a “demand and refusal is no evidence of a conversion in the case of a carrier, or wharfinger, where the goods are proved to have been lost through negligence, or stolen, and therefore trover does not lie, though the owner may have an action upon the case ;” and he cites many authorities. Why is the refusal in such a case no evidence of conversion? I answer, because the carrier, or wharfinger, has it not in his power to deliver the goods, at the time of the demand. So here, Pool’s refusal to deliver the slaves after he had parted with them, according to the bailment, cannot amount to evidence of a conversion. And if, as the books say, Pool came to the possession by “*delivery or bailment*,” as he unquestionably did, he was not guilty of a conversion before demand and refusal; and as refusal to deliver, when he could not, is no evidence of conversion, there has been a total failure to establish any thing like a *tort* against him.

The importance of the doctrine, which the opinion delivered tends to settle, has induced me to suggest many *fictitious cases* for the purpose of testing its operation. I have endeavored to avoid *misconception*, or *misapplication* of its principles to the supposed cases. If, however, I have erred, I have the consolation, that the opinion contains an “*exclusion of a conclusion*,” in reference to the cases which may hereafter come up, and it will be then proper in the present members of the bench, or our successors, to review this case, in deciding how far it shall be the rule to govern others.

Believing that Pool is not responsible in any form of action, I have not considered the question as to the propriety of the remedy.

I think the instruction which the court refused to give was applicable to the facts proved, and ought to have been given.

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1883.

**Cain et als. vs. Flynn.**

DEBT.

[Mr. Turner for Plaintiffs : Mr. Caperton for Defendant.]

FROM THE CIRCUIT COURT FOR ESTILL COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 18.

AN inquisition upon a warrant of forcible entry and detainer having been found against John Cain, senior, and John Cain, junior, they filed a traverse to the circuit court, and executed a bond, with two others as sureties, to be void on condition that the traverse should be prosecuted with effect.

Traverse, taken by two defendants, in a warrant of forcible entry—inquisition found true as to one : untrue as to the other.

On the trial in the circuit court, the inquisition as to John Cain, senior, was found to be true ; but as to John Cain, junior, untrue.

Upon that bond, this action of debt was instituted, against all the obligors.

Suit on the traverse bond : declaration : breach.

Among other minor and consequential breaches, all appropriately charged, the declaration avers, as the principal breach, that the traverse was not prosecuted with effect, but that the inquisition was found to be true.

Three pleas were filed. 1st, covenants performed ; 2d, that the traverse was prosecuted with effect ; and, 3d, *nul tiel record*. Issues were concluded on the first and third ; but no notice seems, afterwards, to have been taken of the second plea.

Pleas, and issues.

Verdict and judgment were rendered for the plaintiff in the action, now defendant in error. The plaintiffs in error now complain that no issue was formed on their second plea ; that the issue of *nul tiel record* ought not to have been found against them ; that, as one of the traversers succeeded in the circuit court, there was no breach whatever of the traverse bond, and that, therefore, the judgment is wholly unauthorized.

Verdict &c.

The errors thus complained of will be briefly considered in the order in which they have been stated.

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If two pleas, alike, in substance, are filed, and issue is taken on one, a failure to notice the other, is not cause for reversal.

*Similiter* is not indispensable—especially after verdict.

Two defendants were found guilty of forcible entry and detainment and traversed the inquisition: the declaration, on the traverse bond, avers (for breach) that the traverse was not prosecuted with effect: the record, produced in evidence, shews the inquisition found true as to one, untrue as to the other—it does not support the declaration, and the variance is fatal.

*First.* The second plea was not good, unless it be deemed, in effect, a plea of *nul tiel record*; and, in that view, no issue upon it was necessary, as the same issue was concluded in the third plea. As the declaration averred that the traverse was not prosecuted with effect, *prout patet per recordam*, the only mode of traversing that allegation was by denying that there was such a record; and, even if the simple negation of the allegation had been a good defence, a formal *similiter* was not necessary, especially after verdict.

*Second.* As to John Cain, senior, the traverse was not prosecuted with effect; and as to him as principal, and the other three obligors as his sureties, there was a breach of the condition of the bond. But so far as John Cain, junior, was a principal, and his co-obligors sureties, there was no breach, because, as to him, the traverse was prosecuted with effect. And, therefore, if the declaration and the record of the traverse case substantially correspond, the judgment was right.

*Third.* But the breach, as assigned, imports that the inquisition, as found, was adjudged to be true, that is, of course, against both of the Cains. The record shews that the inquisition was not found altogether true, but as to John Cain, junior, untrue. Wherefore, there was no such record as that which the declaration described, and the circuit court erred in not so adjudging on the issue upon the plea of *nul tiel record*.

For this error only, the judgment must be reversed, the verdict set aside, and the cause remanded for further proceedings—and with leave to amend the declaration.

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Dana  
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119 60**Bates vs. Courtney's Administrator.**APPEAL FROM  
A J. P.

[Mr. Anderson for Plaintiff: Mr. Turner for Defendant.]

FROM THE CIRCUIT COURT FOR GARRARD COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 18.

THE act approved February 12, 1828, makes it the duty of the court, whenever the opinion is entertained that an appeal bond is defective, to allow the appellant "forthwith, upon the defect being announced by the court," to execute a new bond.

Appeal should not be dismissed for a defect in the appeal bond, provided appellant will forthwith give a new and sufficient bond.

The policy of this act forbids that the circuit court shall peremptorily dismiss an appeal from the judgment of a justice, when the appellant offers "*forthwith*" to execute a good bond. The court should announce the defect, and then if the appellant does not execute a new bond, with security such as the court approves of, as soon as a proper bond can be prepared by the clerk, the appeal should be dismissed. The act of December 23, 1831, does not repeal the act of 1828, and both acts taken together shew the intention of the legislature to secure to appellants a trial upon the merits of the controversy, by affording every facility to cure defects in the appeal bond.

As the appellant offered *forthwith* to execute a new bond, we think he should have been permitted to do so, although he had once before executed a bond in lieu of the original appeal bond, both bonds having been adjudged defective. It does not appear that the court had directed the clerk to prepare the new bond so as to obviate any defect.

New bond may be given repeatedly — whenever the existing bond is declared defective.

It was the clerk's duty to prepare the new bond, and if he left out an important stipulation, it was not the fault of the appellant, and he ought not to be prejudiced by it.

Clerk's duty to prepare an appeal bond—party should not be prejudiced by his error.

Judgment reversed, with costs, and cause remanded, with directions to allow the execution of an appeal bond, such as the court shall approve, provided the appellant does it forthwith, and for a trial on the merits.

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1833.

ASSUMPSIT.

**Bell et als. vs. Wood.**

[Messrs. Morehead and Brown for Appellants: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

April 19. Chief Justice ROBERTSON delivered the Opinion of the Court—  
Judge Nicholas did not sit in this case.

Statement of the  
case.

ON the 18th of October, 1830, Richard Jackson, master of the steam boat Cora, owned by the appellants, lying at Orleans, and about departing with freight for Louisville, signed bills of lading, acknowledging that he had received on board, from Gronning and Wright & Co. of New Orleans, boxes of goods marked "*W. Wood, Frankfort, Ky.*"—one to the care of Gronning and Wright & Co., New Orleans, and the others to the care of Muir & Wiley, Louisville, "to be delivered, in the like good order and condition, at the aforesaid port of Louisville, the dangers of the rivers only excepted, unto ———, or his assigns, he or they paying freight for said goods at the rate of one cent a pound, *with the privilege of reshipping on any smaller, good boat, in case the river shall be too low.*" Having ascended in safety as far as Trinity, on the Ohio river, the master of the Cora, which was a boat of the largest class, ascertained that the Ohio was so low that his boat could not then proceed to Louisville, and thereupon he "reshipped" the greater portion of his cargo on the Fairy, (a steam boat of the smallest size,) and on the keel boat Betsy Baker, "*in tow to the Fairy.*" The Ohio was so low that even the Fairy could not ascend with a full load, and the boxes marked "*W. Wood*" were put on board of the keel boat Betsy Baker; and a portion of the Cora's cargo was left at Trinity. In ascending the Ohio river, in the night, the Betsy Baker, then "*in tow to the Fairy,*" struck a snag and sunk, whereby the goods in boxes marked "*W. Wood*" were damaged to the amount of five hundred dollars.

In March, 1831, the appellee brought an action of assumpsit against the appellants, as the owners of the *Cora*; and, upon the general issue, a verdict and judgment for five hundred dollars, in damages, were rendered in his favor; to reverse which this appeal is prosecuted.

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1833.

*Bell et als.*  
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Points to be decided here.

The following points are presented for the consideration of this court: 1st. Is assumpsit maintainable? 2nd. Can the action be maintained in the name of the owner of the goods? 3rd. Is there sufficient proof that the appellee was the owner? 4th. Did the circuit court err in instructing the jury, upon the motion of the appellee?

*First.* As it must be presumed, from the nature of the business in which the master was employed, that he had plenary authority to make such a contract as that which has been stated, the owners of the *Cora* must be bound in consequence of that contract, and according to its tenor and legal effect. It is not now necessary to enquire whether a suit could be maintained against the master on the bill of lading, as the foundation of the action; nor whether, if such a suit could be maintained, it should be covenant or case; for were it conceded that covenant would be the proper action against the master, still, as the bill of lading is in his own name alone, it cannot be deemed a covenant by the appellants. But, as the master was acting within the scope of his authority, an undertaking by the owners of the boat, to be responsible for his acts, and according to the effect of his contracts, was implied by law; and assumpsit is an appropriate form of action for a breach of such implied contract. Trespass on the case, for a breach of duty, might be maintained; but assumpsit for a breach of the contract, is also appropriate, (1 *Wheaton's Selwyn*, 314. 2 *Chitty on Plead.* 117, 270—1 and notes.) If the form of this suit had been case *ex delicto*, instead of assumpsit, there could be no doubt of its appropriateness; and we think there should be as little doubt of the propriety of assumpsit.

That the master of a steam boat is authorized to make contracts to carry freight, is a presumption arising from the nature of his employment.

*Queries*—as to his liability on the bill of lading.

The contracts of the master of a vessel, (within the scope of his authority,) bind the owners.

*Assumpsit* lies against the owners of a steam boat, in favor of the injured party, for a breach of such contract. —Trespass on the case, for damages resulting from a breach of duty.

*Second.* If the appellee was the owner of the goods, then, whatever was the form of the consignment, they should be deemed to have been received on board for him, and to have been transported at his expense and risk, and not at the expense or risk of Gronning and

The owner of the goods has the right of action: in form, *ex delicto*, or *ex contractu*, as the case may be.

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The owner of freight must be deemed the consignee, where none is named (the blank not filled up,) in the bill of lading.

Wright & Co. who delivered them *for him* to the master; or of Muir and Wiley to whose care they were directed. And, as the name of the *actual* consignee was left blank, and was never inserted, and there was no proof, that the master was directed, or ever-agreed, to deliver the boxes to any other person than the owner, or to the care of Muir and Wiley *for him*, he is the only person who appears to have been actually injured by the submersion of his goods, and should be deemed a party to the contract of affrieghtment, according to its legal effect *as between him and the owners of the boat*. He must be deemed the *consignee*, because he was the owner, and the goods were directed to the care of Muir and Wiley, *for him*. It is not material to inquire whether Muir and Wiley might have maintained a suit, in their names, against the master or against the owners of the boat; for whether they might, or not, the appellee, as owner of the goods, may sue the appellants, as owners of the boat, on their implied contract to fulfil the authorized undertaking of the master, or to indemnify *him* for the master's delinquency. (See 1 *Wheaton's Sketch*, 312-13, 1 *Chitty on Plead.* 3, and *Potter vs. Lansing*, 1 *Johnson's Reports*, 215, and the authorities therein cited.) The legal right was in him, and, therefore, the implied undertaking of the owners of the *Cora* inured, by legal intendment, to him and for his own benefit. That he might have maintained an action *ex delicto*, could not be doubted; and we are disposed to think that he should be deemed a party to the contract implied by law, and that consequently, he may maintain the action in form *ex contractu*.

Bill of Exceptions shewing that the ownership of goods was not contested, but admitted, in the court below, received as sufficient evidence of the fact here.

Query—whether, when goods are shipped in a vessel of a better class (steam-

— *Thirdly*. We are authorized to infer from the bill of exceptions, that the appellee was the owner of the goods in the boxes marked "*W. Wood.*" His proprietorship seems not only to have been not contested on the trial, but to have been virtually admitted by the appellants in their bill of exceptions.

*Fourthly*. After proof had been introduced, shewing that goods transported in a keel boat, were liable to more risk, and subject to a much higher rate of insurance, than when carried in a steam boat, and that goods were more secure in a keel propelled, by itself, in the ordinary mode,



than when attached to a steam boat ; but that, for three years prior to the institution of this suit, most of the goods that had been brought from the mouth of the Ohio to Louisville, when that river was too low for navigation by the larger steam boats, had been brought in keel boats attached to steam boats of the smaller size,—the circuit court, at the instance of the appellee, instructed the jury, that the master of the Cora had no right, according to his undertaking, to reship the appellee's goods on any other kind of boat than a steam boat ;—and that even if he had such a right, the owners were responsible for the damage to the goods, if a keel boat was less liable to accident or injury when propelled in the ordinary mode than when drawn by a steam boat.

As to the propriety of the first branch of the instruction, the two judges constituting the court in this case, do not concur in opinion. Judge Underwood thinks that the words, "*any other smaller, good boat*," should be understood to mean, any smaller, good boat, of *any kind* fit for carrying freight up the Ohio river, and which, according to the common course of navigation in low water, was used for that purpose. He does not feel authorized to restrict the literal and abstract import of the terms employed by the parties ; and therefore, is of the opinion, that a keel boat was contemplated by the parties, and is embraced in their contract.

The Chief Justice thinks that the nature of the duty to be performed, the object of the special reservation in the contract, and the subject matter to which the comparative "*smaller*" referred, should all be considered ; and that, though "*any other good boat*" may, in the abstract, embrace any boat of any kind, if in good condition, nevertheless, "*any other smaller, good boat*," when connected with the antecedent stipulation, should be interpreted as meaning a smaller *steam* boat. The parties had reference to the steam boat Cora, and apprehended that, *merely because she was of the largest size*, she might not be able to ascend the Ohio, and therefore agreed that a "*smaller*" boat than the Cora might be substituted ; or in other words, a boat differing from the Cora in *size*, but not in kind. He thinks that the true intent and ob-

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boat,) 'with the privilege,' (as expressed in the bill of lading,) 'of reshipping on any smaller, good boat, in case the river shall be too low,' they may be transferred to a vessel (keel boat) of an inferior class—two judges divide in opinion.—But if the boat to which the goods are transferred, be propelled in a manner different from that for which she was calculated, and by which the danger and risque is increased, the owners of the boat in which the shipment was first made, are responsible for the loss, or damage, of the goods.

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*Wood.*

ject of the parties may be expressed in the following paraphrase : "*this steam boat Cora, which has been selected because she is a good steam boat, may be too large ; if so, another, of smaller size, and which will not be too large, may be substituted :*" that is, of course, another and smaller steam boat. This interpretation, (as he thinks,) accords with the object of the reservation, and with philological propriety ; and is also, rather fortified than weakened by the fact (proved by the appellants,) that another bill of lading, given by the same master, at the same time, for the goods of one Bowles, provided that, if the river should be too low for the Cora, *his goods might be re-shipped "in a good keel or steam boat,"* and at a higher rate of freight. The language of the two bills is so essentially variant as to indicate a different understanding in the two cases.

But this subject will not be pursued. There is no difference of opinion in the sitting members of the court as to the last branch of the instruction. It is not material to enquire what other masters of steam boats may have done, when the river was too low for boats of the larger size to ascend, and when no special contract designated the rights and duties of the parties concerned. This case must be tested by the express contract. If the master of the Cora had a right, according to his contract, to substitute a keel boat, still, if the goods when shipped on the keel, were damaged in consequence of attaching the keel to a steam boat, the owners should be responsible, because such a mode of transportation was not provided for by the contract, and being (as proved,) more perilous than a transportation in a keel propelled by itself, should not be deemed to have been contemplated by the parties. It is scarcely to be doubted that, if the goods had been in a keel propelled by oars or poles—the usual and safer mode, they would not have been sunk. And we think that *due care* has not been observed, according to the express contract.

This decision *may* operate harshly. But it seems to be required by the special contract. And sound policy requires that common carriers, and especially upon the

large rivers, should be held strictly to their engagements, and to the performances of their legal and conventional duties.

Wherefore, it is the opinion of this court, that the judgment of the circuit court be affirmed.

Spring Term

1833.

Foree

vs.

Smith.

## Foree vs. Smith.

PRACTICE.

[Mr. Sanders for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR HENRY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 19.

Two points of practice are presented in this case for consideration.

*First.* Should this court notice a bill of exceptions purporting to have been taken after the trial, but during the same term, and which, using the present tense, "*excepts*," does not *expressly* shew that the exception was *made at the proper time*?

*Second.* If the circuit court refuse to permit a competent witness to be examined, should the judgment be reversed for that cause alone, unless it shall appear that the witness was offered to prove something pertinent to the issue?

*First.* Such an exception as that which has been stated is certainly irregular; and it would be more proper, when a bill of exceptions is signed after the trial, to state in it, in some clear or express mode, that the exception had been *taken at the proper time*. But, as the defendant in error made no objection to the bill of exceptions, this court may infer that the exception had, in fact, been *made* at the proper time, and that the right to make out a bill of exceptions during the term had been reserved, and

Exceptions to decisions of inferior courts, should be taken, as the decisions, respectively, are rendered—*tho'*, the right being reserved, they may be written out and signed at any time during the term.—But—If a bill of exceptions, signed after the trial, uses the present tense, ('*excepts*,' ) implying that the exception is *then* first taken, still if it be signed without objection from the adverse party, it will be presumed, in the appellate court, that the right was reserved.

A party is not bound to state

what he is about to prove by a witness whom he offers. And if a competent witness is offered, it is error to reject him, and ground for reversal, although it do not appear whether his testimony would have been material, or not.

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this deduction is fortified by the presumption that the circuit judge would not have signed a bill of exceptions respecting a decision which had not been excepted to, but had been acquiesced in.

*Second.* Nor do we think that a party is bound to announce the fact which he intends to prove by a witness, before he shall have a right to swear and examine him.

Wherefore, as it does not appear in this case that the exception was not actually taken at the proper time; and, as it does not appear that the rejected witness, who was competent, was offered for the purpose of proving an immaterial fact, the judgment of the circuit court should be reversed, for error in refusing to permit the witness to be examined.

Judgment reversed, and cause remanded for a new trial.

CHANCERY.

### *Butler against Triplett.*

[Messrs. Morehead and Brown for Appellant: Mr. Triplett and Mr. Monroe for Appellee.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

April 20.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the facts.

IN 1822, Butler conveyed to Triplett, some real estate in Mountsterling, at the price of four thousand dollars; paid in promissory notes, assigned by Triplett, for two thousand and nine hundred dollars; a tract of land at six hundred dollars, and another tract of one thousand and forty acres, at five hundred dollars—both conveyed by Triplett to Butler.

In the conveyance of the latter tract, Triplett covenanted that, if any portion of the land should be "*taken*" by a superior claim, he would convey to Butler, out of an adjoining tract, two acres for every acre which should be so taken.

## OF APPEALS OF KENTUCKY.

In 1830, Butler having represented to Triplett that an adversary claim of one Thomas, deemed paramount to that of Triplett, covered four hundred and five acres of the thousand and forty acres, requested a fulfilment of the warranty, without a suit for testing the conflicting titles; and Triplett, having, in the mean time, sold and conveyed to a stranger, the land out of which he had covenanted to indemnify Butler, agreed, in consideration of the premises, to pay him four hundred and five dollars; and accordingly paid him thirty five dollars, and gave him his bond for three hundred and seventy dollars.

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Triplett.

To enjoin a judgment obtained on that note, and rescind the contract for the land, Triplett instituted this suit in chancery. He alleges in his bill, that he was not responsible to Butler, for more than the original consideration for the four hundred and five acres of land covered by Thomas' claim, which was less than fifty cents an acre; and that, therefore, instead of four hundred and five dollars, he was not bound to pay as much as two hundred dollars, but that the note was executed in haste, and through inadvertence and mistake.

Bill.

He suggests doubts as to the validity of Butler's title to the Mountsterling estate, and avers, that he had paid Butler eighty seven dollars, for which he asks a decree.

Butler, in his answer, alleges, that he had a perfect title to the property which he had conveyed to Triplett, and exhibits documents of title apparently complete. He denies that there was any haste, or mistake, in the execution of the bond for three hundred and seventy dollars; avers that Triplett had sold, for fifty cents an acre, the land which he had covenanted to convey to him as an indemnity; and therefore agreed, that, as he could not make him a title to the land, he would pay him money in lieu of it, at the rate at which he had sold it; and that consequently, as eight hundred and ten acres (double the quantity admitted to have been virtually lost,) amounted, at fifty cents an acre, to four hundred and five dollars, Triplett agreed to pay him that sum.

Answer.

Upon the bill and answer, the circuit court perpetuated the injunction to the entire judgment, and decreed to

Decree

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If vendee of land discover a paramount title, and, without eviction or suit, obtain the bond of his vendor for an agreed sum as an indemnity for the anticipated loss, the consideration is sufficient to uphold the bond.

A payment to the holder of an obligation, may be presumed—when it does not appear at what time or on what consideration it was made—to have been made on account of the obligation.

If the vendor of land covenant with his vendee, that if any of the land is lost, he will convey, of another tract, two acres for one, and a paramount title appears, of which the vendor has notice, and afterwards sells the land out of which the indemnity was to be made, for a price per acre equal to that he received for the tract first sold—he may be held accountable to the first vendee, for the proceeds of twice as many acres as he lost, although the amount be double the consideration that he paid for it.—The vendor cannot be relieved against his bond given for a compromise on that principle.

Triplett a restitution of the thirty five dollars and the eighty seven dollars.

As there was no cause for rescinding the original contract, the only ground on which the decree could be maintained, would be, that there had been a total want of consideration. But, although there had been no actual eviction, there was a valid consideration for the bond; for Triplett might have waived a formal eviction, which would have increased his responsibility; and that he did so, should be inferred from his conduct and even from his bill. It is too late, therefore, to object, even if he had objected in his bill, that Butler had never been evicted. There is no allegation of fraud, or misrepresentation, or even misconception, as to Thomas' claim, or as to the extent of its interference with Butler's thousand and forty acres. Consequently, there is no sufficient ground for the decree of the circuit court.

Although Triplett does not state when, or on what consideration, he paid the eighty seven dollars, yet we are inclined to the opinion, that, as there is no proof that he made the payment prior to the execution of his bond, or that he owed Butler on any other account, he should be entitled to a credit for the eighty seven dollars.

But, as Butler might have been entitled to the eight hundred and ten acres of land, if Triplett had not sold it, and especially as Triplett parted with the title after he seems to have had notice of the interference of Thomas' claim, it would be difficult to maintain that he was under no obligation, either equitable or moral, to account to Butler for the price which he had received for the eight hundred and ten acres, or for its value at the time of their settlement. What that price or value was, can only be inferred from the fact that Triplett's bond may appear to have fixed it at fifty cents an acre, and he does not suggest that it was less. It seems to us, therefore, that, having given his bond for that amount, he should not impeach the consideration, unless he could es-

tablish fraud or mistake. There is no proof whatever of either ; and we do not feel authorized to *presume* either, under all the circumstances.

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vs.  
*Wolfe.*

There being no proof to the contrary, this court should presume that the parties understood their relative rights and obligations, and accordingly adjusted them, by a fair, amicable, and final compromise, which was a sufficient consideration for the bond.

Wherefore, it is ordered by this court, that the decree of the circuit court be reversed, and the cause remanded with instructions to perpetuate the injunction for eighty seven dollars, and dissolve it for the residue of the amount enjoined. Triplett must pay the costs in this court ; but, as he is entitled to some relief, he should have a decree for the costs in the circuit court.

If a complainant is entitled to any relief (though partial) he recovers costs.

## Robards vs. Wolfe.

DEBT.

[Mr. Richardson for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR BULLITT COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 20.

THIS was an action of debt, upon an injunction bond, against several defendants. Issue was taken upon the plea of *non est factum* filed by one of them. Upon the trial of this issue, the court instructed the jury, "that the bond sued on, being official, its attestation was *prima facie* evidence of its due execution by the defendant George L. Robards." The propriety of this instruction is the only question.

The general, if not invariable rule, is, that the plea of *non est factum* throws the *onus* on the party producing the deed. 3 *Litt. Rep.* 364. Here Wolfe relied on the bond as the foundation of his action. Were it conceded to be the presumption, resulting from the attestation of the clerk, that the bond was not forged ; still, if the genuine-

Plea of *non est factum*, to an action on an *injunction bond*, attested by the clerk, casts the *onus probandi* on the plaintiff—as in other cases.—For if the attestation were an official act, and evidence of the signing, it would not identify the individual sued, as the one who signed.

1d 155  
96 311

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1833.

*Robards*  
vs.  
*Wolfe.*

Clerks are not required by statute, to attest injunction bonds—hence such attestation is not strictly official: tho' very proper.

ness of the bond be admitted, that does not identify the person of the defendant, and prove him to be the individual who did in fact execute the bond. The identity of the person is often an important inquiry. There may be two men named George L. Robards. Which of the two executed the bond? Was it the defendant? It is difficult, if not impossible to conceive how the official character of the bond can afford a satisfactory answer to the questions. The defendant ought not to be required to prove negatively, that he was not the man. But the acts of 1796 and 1798, (2 Dig. 669,) and that of the 24th January, 1827, regulating the taking of injunction bonds, contain no provision expressly requiring the acknowledgment of the bond before the clerk, and that he should attest it officially. Although it is in practice best that he should attend to the execution of the bond, and witness it, and even if it be inferrible from the tenor of the acts, and particularly the last, that it is his duty to do so, we should nevertheless, in conformity to a long settled rule, be disposed to require proof of the execution of the bond *by the defendant*, when he puts in the plea of *non est factum*.

Instruction that no state of proof could warrant, is ground for reversal, though it does not appear what the evidence was, to which it was intended to apply.

It is contended, that the judgment ought not to be reversed, because the bill of exceptions does not state the evidence upon which the court predicated the instruction. We are of opinion, that the instruction could not be sustained under any imaginable proof. Whether the evidence, if indeed any was introduced, was strong or weak, the instruction was calculated to aid the plaintiff in a manner unauthorized by law. It seems to have been designed to supersede the necessity of introducing proof on the part of Wolfe.

Judgment reversed, with costs, and cause remanded for a new trial.



Spring Term  
1833.

**Williams against Wilson.**

CHANCERY.

[ Mr. Owsley for Plaintiff : Mr. Tobin for Defendant. ]

FROM THE CIRCUIT COURT FOR HARDIN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 22.

Contracts.

IN February, 1822, Henry Williams sold to Archibald S. Letcher one hundred and eighty four acres of land, at six dollars an acre, amounting, in the aggregate, to one thousand one hundred and four dollars, payable in brick, money, and brick work, at various specified times ; and, by an article of agreement, signed by both contracting parties, covenanted to convey the legal title on receiving the entire consideration. The vendor having died before he had received the whole consideration, Walter Williams, who had been appointed guardian to his infant children, entered into some unexplained arrangement with Letcher and William E. Wilson, the defendant in error, in consequence of which he gave to Wilson the following obligation :—

“ I do oblige myself, as guardian of the heirs of Henry Williams, deceased, to agree that there shall be a good and sufficient title for one hundred and eighty four acres of land, sold by Henry Williams, in his life time, to A. S. Letcher, and by him to Wm. E. Wilson—the title to be made by said heirs to said Wilson, as soon as said Wilson shall pay to Walter Williams, guardian for said heirs, one hundred and eighty two dollars, sixty cents. Given under my hand, this 7th of May, 1828.

W. WILLIAMS, *Guardian for the  
heirs of H. Williams, dec'd.*”

“ The whole consideration, seven hundred and fifty dollars, for which the heirs are bound to convey agreeable to the above—it is understood that the land is to stand as security until the money is paid.”

W. WILLIAMS, *Guardian.*”

“ Teste—James Jeffries.”

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1833.

*Williams*  
vs.  
*Wilson.*

Note for part  
of the contract,  
judgment on it,  
and bill in chan-  
cery, with in-  
junction.

Answer : cross  
bill and answers  
—new parties  
and answers.

Afterwards, Williams having obtained a judgment against Wilson, on a note which he had given for the hundred and eighty two dollars, sixty cents, Wilson filed a bill in chancery against Williams, alleging that he had bought the land from Williams, for seven hundred and fifty dollars, and had paid five hundred and sixty eight dollars thereof—" *some time in the year 1828, and for the balance gave his note,*" upon which the judgment had been obtained ; alleging also, that he did not believe that *Williams* had title to the land, or could make a good title ; and praying for an exhibition by Williams, of his documents of title, and for a conveyance to himself of the legal title, if a good title should be exhibited, but, otherwise, for a rescission of the contract, and finally, for an injunction to the judgment.

Williams, in his answer, says that Henry Williams had sold the land to Archibald S. Letcher, for *seven hundred and fifty dollars* ; of which Letcher had paid five hundred and sixty eight dollars prior to the vendor's death ; that, after the death of Henry Williams, Wilson bought the land from Letcher, and that, "*at the request of all parties,*" he (the respondent,) surrendered Letcher's bond, took Wilson's in lieu of it, and gave the obligation which has been quoted. He also averred, that his wards had a good legal title to the land, and made his answer a cross bill against Wilson and Letcher, which they answered. *Wilson* reiterated the substance of his bill. Letcher stated, that he had agreed to give one thousand one hundred and four dollars for the land, and had paid the whole of the price, except one hundred and eighty two dollars, sixty cents, before the death of Henry Williams ; that there was no written memorial of his contract for the land ; that, after the death of Henry Williams, the contract was rescinded, by himself and Walter Williams, the guardian ; that Wilson afterwards bought the same land from the guardian, for seven hundred and fifty dollars, and that he (Letcher,) "*had nothing to do with their contract,*" or "*with Wilson.*"

Walter Williams afterwards made his wards parties to an amended cross bill. And they, by a guardian *ad litem*, answered, and exhibited the documents of their title,

But did not admit that they had any knowledge of any sale of the land by their ancestors.

The circuit court decreed a rescission of the contract with Wilson, a perpetuation of the injunction to the judgment, and the payment, by Walter Williams, to Wilson, of five hundred and sixty eight dollars, with legal interest thereon from the 31st of December, 1828, "*until paid*," and the costs of the suit at law, after deducting thirteen dollars, assessed as the excess of rents over improvements.

This writ of error is prosecuted to reverse that decree. The assignment of errors is sufficiently comprehensive to embrace every point presented in the record, and will not, therefore, be particularly noticed.

The circuit court erred in decreeing interest, accruing after the decree; and also in rescinding the contract, without ordering restitution of the possession on the payment of the amount decreed. But the decree is, in other respects, more radically erroneous.

I. The record does not justify the rescission of the contract. We deem it unnecessary now to ascertain the true construction and effect of the writing given by the plaintiff in error; for whether it be considered an agreement by him merely to give his assent, as guardian, to a conveyance by his wards, to Wilson, instead of Letcher, with whom their ancestor had made the contract for the land, or a covenant binding him, as guardian, to have the title made to the defendant; or whether it should be deemed an obligation binding on the plaintiff as guardian merely, or in his own right, is not essential to a solution of the question presented by the decree for rescission. If every thing most unfavorable to the plaintiff in those particulars were conceded, still the decree rescinding the contract cannot be approved.

The conveyance was not, as alleged in the bill, to have been made by Walter Williams, but by his wards. Although the true character of the contract has not been

paid—a bill for a rescission of the contract, which treats it as one binding the guardian himself to convey, alleging that he has no title, is erroneous and insufficient. The decedent's vendee, and his heirs (the guardian's wards) are necessary parties.

It appearing, in such case, that the complainant might have a specific execution, he is not entitled to a rescission, of the contract.

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1833.

*Williams*  
vs.  
*Wilson.*

Decree — and  
writ of error.

Interest accruing  
after the decree,  
should not be  
allowed.

When a rescission of a contract of sale is decreed, restoration should be ordered of the things sold.

One makes a bargain for the sale of land, receives part of the pay, and dies: his vendee transfers the bargain to a third party, and with the latter, the guardian of the decedent's children enters into a written agreement (of doubtful construction as to its obligation on himself, but,) stipulating that his wards shall make a title as soon as a balance of the consideration is

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clearly developed, and although some effort seems to have been made to misrepresent or conceal it, we are of opinion that, whatever may be its true nature and effect in other respects, it was not a *sale by the plaintiff to the defendant*; but that it was, as represented by the plaintiff, a recognition of a transfer from Letcher to the defendant, and an undertaking (if a *covenant* at all by the plaintiff, for a conveyance,) that the heirs of Henry Williams should make a deed to the defendant, instead of Letcher, and with Letcher's consent, in consideration of his contract with Henry Williams, and for what had been paid by him to Henry Williams, and that which was assumed to be paid for him, (Letcher,) by the defendant to the plaintiff, as the guardian of Henry Williams' infant heirs. And in this aspect of the case, not only are the allegations of the bill erroneous and insufficient, but it seems to us, that, if the bill had contained correct and appropriate allegations, Letcher, as well as Henry Williams' heirs, should have been made a party by the plaintiff, before he could have entitled himself to relief in equity, either by a rescission, or a specific execution. He certainly could not properly obtain a decree for a conveyance to himself, unless Letcher, with whom he made the contract for the land, and Henry Williams' heirs, who were liable for the title to Letcher, had been made parties to his bill. And knowing, as he is presumed to have known, all the facts connected with the character of Henry Williams' sale to Letcher, and with the agreement between himself and the plaintiff, he should not be entitled to a rescission in chancery, without first seeking, in the appropriate mode, to obtain a conveyance, by which all persons concerned, would be concluded, and an end would be put to further controversy respecting the original sale, or the subsequent contract with Letcher and the plaintiff. It does not appear that the contract between Henry Williams and Letcher, was ever cancelled; and even if the plaintiff had attempted its cancellation, all his efforts would have been ineffectual. If then, the contract between the plaintiff and defendant be rescinded, what will become of the contract between Letcher and Henry Williams, or the agreement between the

defendant and Letcher? And why should the defendant have a decree for rescinding his agreement with the plaintiff, without making Letcher, who would be affected by that rescission, and Henry Williams' heirs, who may be able and willing to make a title, parties to his bill for relief. The fact that they are parties to the plaintiff's cross bill, would not authorize a decree in the defendant's favor, affecting their rights or interests immediately or incidentally—directly or indirectly. It results, also, that the personal representatives of Henry Williams would be proper parties to any bill for relief.

II. The decree against the plaintiff for five hundred and sixty eight dollars cannot be sustained. It is true, that the plaintiff says, in his original answer, that the defendant "*was to stand in Letcher's shoes.*" But still it does not appear, that the defendant ever paid a cent to either the plaintiff, or Letcher; nor does it appear that the plaintiff had ever received a cent in consideration of either of the contracts respecting the land. The defendant alleges, that he bought the land from the plaintiff, and, during the year 1828, paid (without saying to whom) five hundred and sixty eight dollars of the price. The plaintiff denies that he ever received from the defendant, any part of the five hundred and sixty eight dollars, and avers that the defendant bought the land from Letcher. Letcher, in his answer to the plaintiff's cross bill, says that he "*had nothing to do with Wilson or his contract.*" The writing between the plaintiff and defendant, as well as some extraneous evidence, tends strongly to shew that the defendant did not buy the land from the plaintiff, but from Letcher, and there is no proof in the record tending, in any degree, to shew that the plaintiff ever paid to any person, any part of the price which he was to give for Letcher's claim to the land, and for the plaintiff's agreement that his wards should make the title to the defendant in lieu of Letcher.

Under such circumstances, it is not consistent with equity to decree against the plaintiff five hundred and sixty eight dollars, even if his agreement should be construed as imposing on him any personal liability. Unless the defendant had paid that sum to the plaintiff, or

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1838.

Williams  
vs.  
Wilson.

Where the bill for rescission (in such cases,) alleges that complainant paid a sum of money on account of the purchase—but does not say to whom, whether to the guardian, or to the decedent's vendee, and the defendant, tho' he admits that the compl't "*was to stand in L's shoes,*" (i. e. in the place of the decedent's vendee,) yet denies that he (the guardian) ever received a cent, a decree against him for repayment of the money cannot be sustained. In this view of the case also, the wards and decedent's vendee were necessary parties.

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1833.

*Carrico*  
vs.  
*Neal & others.*

to Letcher, he is not entitled to a decree for it ; and, *as to so much*, the undertaking of the plaintiff (who was a stranger) would have been without consideration. It is also obvious, that, before he could be entitled to a decree for the five hundred and sixty eight dollars, he should make Letcher and Henry Williams' representatives parties to his bill, if, as we have supposed from the record as it is now exhibited, Wilson bought from Letcher, and Williams agreed only that the title should be made to him instead of Letcher. For, in such a case, if the consideration paid by Letcher to the intestate, be recoverable, Letcher who paid, and the representatives of him who received, should be made parties to the suit. The plaintiff should not, at the utmost, be considered more than a collateral guarantor.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with leave to amend the bill, and to make the proper parties ; and with instructions (if the amendment shall not be made in convenient time) to dissolve the injunction, with damages, and dismiss the bill, with costs.

WILL CASE.

## *Carrico against Neal and Others.*

### TWO WRITS OF ERROR.

[Mr. Monroe and Messrs. Morehead and Brown for Plaintiff: Mr. Richardson and Mr. Haggin for Defendants.]

FROM THE SHELBY COUNTY COURT.

*April 22.* Chief Justice ROBERTSON delivered the Opinion of the Court.

Two papers offered, in the co. ct. as wills of D. Neal—one admitted: the other rejected—separate writs of error to each decision.

Two documents each purporting to be the last will of Doris Neal, deceased, were offered to the county court of Shelby, for probate ; the first, dated in 1825, was admitted to record as the true last will, and the other, dated in 1830, only three days before the testator's death, was rejected.

One writ of error is prosecuted to reverse the order admitting the first paper, as the last will ; and the other

writ of error seeks a reversal of the order rejecting the last document.

As the proof of the due execution and publication of the paper dated in 1825, and of the testator's legal capacity at the time of its execution, is perfectly satisfactory, the only question to be considered, is, whether the document dated in 1830, and which was rejected by the county court, should be deemed a revocation of the former.

The names of three persons are subscribed, in attestation of the rejected document. The testimony of only one of those persons (a youth,) was offered in this court. He swore, that it was his "*impression*" that he was present at the execution, and subscribed his name; that one of the other subscribing witnesses (his mother,) made her mark, according "*to the best of his recollection*;" and that the testator was of disposing mind, "*to the best of his recollection.*"

Although one witness may be sufficient to prove his own attestation, and that of another subscribing witness; nevertheless, when there is no other proof, the evidence of a single witness should not only be credible, but direct, positive and explicit. An "*impression*" is insufficient.

Though there are some circumstances which, in a slight degree, fortify the impression of the witness, yet there are other and opposing facts, which are, at least, equipollent, and neutralize the former.

The proof of the testator's capacity to make a will, is contradictory, and far from being satisfactory. The inference is strong, that the paper was not read to the testator. If subscribed by him at all, it was done hastily, and without the knowledge or presence of any other persons than the subscribing witnesses. The person who wrote the paper (and who and whose wife and son purport to have been the only witnesses,) was a man of bad character, and furnished, by his conduct, some cause for apprehending that he had been tampered with, and induced to fabricate a spurious will. Moreover, he had written a paper purporting to be the will of Doris Neal,

young son;—that the same writer had written, and the same witnesses attested a former will, when the testator was, confessedly, not of disposing mind—are circumstances against the authenticity of the will.

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1833.

*Corrico*  
vs.  
*Neely & others.*

One only, of the three subscribing witnesses, being produced, to prove the execution of a will, he should be credible, and his testimony direct and positive: his "*impressions*," and statements "*according to the best of his recollection*," are not sufficient.

Proof of testator's capacity contradictory and unsatisfactory, and it appearing that, if the will was signed by him, it was done in haste, and without the knowledge of any but the subscribing witnesses;—bad character of the writer of the will, witnessed only by himself, his wife, and

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*Carrico*

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in 1829, and which was attested by *the same names* that are subscribed to the document of 1830, and *is almost its exact prototype*; and it seems to be conceded that, at the date of the paper of 1829, Doris Neal had not a disposing mind; nor does it appear that, afterwards, he ever had any knowledge of the existence of such an instrument.

An inference, in favor of the validity of a will, drawn from the fact, that many of its provisions are like those of a former will, executed by the testator when undoubtedly of disposing mind, is more than rebutted by the fact, that the pretended last will, bears a still closer resemblance to a paper purporting to be a will, signed by the testator when he was clearly not of disposing mind.

It is true that, although there is an essential difference between the provisions in the paper of 1825, and in that of 1830, the two instruments are, in some respects, substantially the same; and hence the counsel for the plaintiff in error contend, that there is strong intrinsic evidence, that the last, as well as the first, was dictated by Doris Neal himself. But it is not improbable that others, who were interested in procuring such a document as that of 1830, knew the contents of that of 1825; and it is quite probable that they could have recollected them as well as such a man as Doris Neal could. *The fact that he had not a disposing mind at the date of the paper of 1829, and that the instrument of 1830, is almost a literal copy from that one, tends strongly to shew that the contents of the paper of 1825, were understood by those who dictated the two last documents, and that the last of the two is not more genuine, or effectual, than the other.*

Although the sins of the father should not reflect on the son, nevertheless, in this case, the peculiar predicament, and reprehensible conduct, (as proved,) of the father, who wrote the paper of 1830, may tend to furnish a clue to the "impression" of the son, and to impair its force. And even that impression, thus weakened, is still more impaired by the fact, that other persons who were at the house of Doris Neal about the time when the paper was attested, if attested at all in his presence, saw the father and mother there, but did not see the son.

Wherefore, considering the nature of the testimony concerning the execution of the document of 1830, and the condition and capacity of Doris Neal about the time of its date, it is the opinion of this court, that the order of the county court, admitting the paper of 1825, and the order rejecting that of 1830, should be, and therefore they are, affirmed.



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1833.

## The Commonwealth vs. West.

[Atto. Gen. Morehead for Plaintiff: Mr. Owsley for Defendant.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

SCIRE FACIAS.

Chief Justice ROBERTSON delivered the Opinion of the Court.

April 22.

THE case of *West vs. The Commonwealth*, (3 J. J. Mar. 641,) must be decisive of this case.

In that case, a judgment by default, on a *scire facias* upon a recognisance "for gaming," was reversed, because "gaming," as described in the *scire facias*, was not an indictable offence.

In this case, the *scire facias* describes the recognisance as requiring an appearance to answer "an indictment for gaming, by setting up and keeping a faro bank, upon which money was bet and won and lost."

The charge, as thus described, would be indictable. But West having cravedoyer of the recognisance, and demurred, a material variance between the *scire facias* and the recognisance, is disclosed. The latter requires an appearance to answer a charge of "gaming" simply. As, therefore, "gaming" is not, of itself and alone, an indictable offence, the recognisance cannot be the foundation of a judgment, and, therefore, according to the principle decided in 3 J. J. Mar. (*supra*), the demurrer to the *scire facias* was properly sustained.

Judgment affirmed.

A recognisance for an appearance to answer a charge of 'gaming, simply; *scire facias* describing it as a recognisance to answer an 'indictment for gaming by setting up and keeping a faro bank upon which money was bet and won and lost: the variance is material.

A recognisance for an appearance to answer a charge of 'gaming' (without describing the game, to shew that it was indictable,) will not support a judgment on a *scire facias*, for a failure to appear.

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CHANCERY.

## Graham against Samuel.

[Mr. Crittenden and Mr. Brown for Appellants : Mr. Morehead and Mr. Richardson for Appellee.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

April 22.

Judge NICHOLAS delivered the Opinion of the Court.—The Chief Justice did not sit in this case.

History of the case.

IN August, 1819, George W. Graham sold and conveyed, by absolute deed, to Francis Graham, a house and lot in South Frankfort, for the sum of fifteen hundred dollars, of which one hundred dollars was paid in hand, and for the balance, Francis Graham executed his notes.

In July, 1820, the deed remaining unrecorded, two executions against George W. Graham, were levied upon the house and lot ; in consequence of which, the Grahams agreed to cancel the contract for the sale and purchase thereof ; that Francis Graham should unite in replevin bonds, replevying the executions, and that he should still hold the deed, as an indemnity for his liability on the replevin bonds, and to secure the repayment of the one hundred dollars. He accordingly united in the replevin bonds, and then caused the deed to be recorded.

In May, 1821, Francis Graham mortgaged the property to the bank of the Commonwealth.

In October, 1825, Samuel obtained judgment against George W. Graham, and the *fi. fa.* issued thereon having been returned no property found, he filed, in October, 1830, his bill against the Grahams and the Bank, to subject the house and lot to the satisfaction thereof, averring the transaction between the Grahams to have been collusive, and for the purpose of defrauding the creditors of George W. Graham.

Francis Graham answered, denying the alleged fraud, and claiming a prior lien for the one hundred dollars,

and for the sums paid by him, for George, in discharge of the replevin bonds.

It appearing that the debt to the bank had been discharged, the circuit court rendered a decree, ordering the property to be sold in satisfaction of Samuel's judgment, to the exclusion of Francis Graham's asserted prior lien.

In the discussion at the bar, a variety of circumstances were relied upon, to shew fraud in fact, or at least a legal presumption of fraud, in the original sale and subsequent arrangement between the Grahams. We do not deem it necessary to express any opinion as to the effect of those circumstances, and therefore shall not state them.

On behalf of Francis Graham, it is contended, that if the transaction be not fraudulent in legal contemplation, the circumstance of the deed not having been recorded in time, and the subsequent change of its character into what was virtually a mere mortgage, will not alone subject the property to the creditors of George W. Graham. To shew that the failure to record the deed will not have such vitiating effect, we are referred to the following language, used *arguendo* by a majority of the court, in the case of *Campbell vs. Moseby*, Lit. Sel. Ca. 362—*Judge Mills* dissenting:—"The mere failure to prove and record a deed of conveyance, as required by the statute, is not, *per se*, fraudulent; and if made on a valuable consideration, although not regularly proved and recorded, vests in the grantee a specific equity to have the title perfected, so as to be operative against all the world; and the holder of such an equity is always preferred, in any contest with the general creditors of the vendor, or subsequent purchasers with notice."

No authority is cited in support of this dictum, and it will be found on examination, not to have been called for, by the case then before the court. But it is there attempted to be sustained, by supposed analogous English decisions, upon their recording statute, which pronounces certain unrecorded deeds to be void as to subsequent purchasers, without any saving as to purchasers with notice; the court of equity there, having determined,

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A deed not recorded within the time limited by the statute, is void as to creditors without notice of the conveyance at the time their debts were contracted:—such unrecorded conveyance will not operate as a mortgage, nor create any lien whatever, in favor of the grantee, against such creditors.—*Query*—as to the effect of notice when the debt was contracted.

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that a subsequent purchaser with notice is not within the protection of the statute, and that he should be compelled to relinquish the title to the first purchaser. It would be difficult to reconcile the opinion thus intimated, or the reasoning adduced in its support, with the case of *Helm vs. Logan*, 4 *Bibb*, 78, where the point was directly presented for adjudication, and it was expressly decided, that neither the creditor himself, or a purchaser under his execution, were affected by notice of an unrecorded deed. It is also there said, that nothing could be more absurd than the recognition of a contrary principle.

But conceding the application, and full force of the analogy suggested in *Campbell vs. Moseby*, to prove that a creditor with notice, is no further or better protected by our statute, than a subsequent purchaser with notice was by the English recording statute, about which we mean, at this time, to give no positive opinion; yet the utmost effect that could be deduced from the analogy, would, by no means, sustain the broad terms in which the dictum referred to, is couched, or the application that is attempted to be given to it in this case.

The principle upon which the English decisions on this subject are based, is, that the statute was made for the protection of innocent, *bona fide*, purchasers without notice; and that, as a subsequent purchaser with notice of an unrecorded deed, is not an innocent, but a *mala fide*, purchaser, he is not entitled to the protection of the statute. The principle is just in itself, and of undoubted equitable parentage. But it is far from warranting the taking from all creditors indiscriminately, the protection afforded them by the statute against unrecorded deeds, because they may have notice of such deeds at the time they come to enforce their demands, without reference to the time when the debt was contracted. On the contrary, if the principle be of the pure equitable origin, and indubitable justness, that we admit it to be, it must require that the creditor should have had notice, at the time the debt was contracted, when according to the intendment deducible from the whole scope and policy of the statute,

he was liable to be prejudiced by the non-recording of the deed. Notice at any subsequent period, could, with no shew of equity or propriety, he considered so far to affect his conscience as to deprive him of the protection against a secret and unrecorded conveyance, which is extended to him by the very letter of the act. We should make the law "palter" with him, and cheat him with the mere "word of promise," were we to determine, that after having declared all unrecorded deeds should be void as against him, when he came to demand the benefit of this declaration, its whole fruition should be snatched from him, by the production, or notice, of the unrecorded instrument. It would be mere mockery, to hold out the idea of protection to creditors against secret conveyances, and yet when they come to enforce their demands, to permit the secret purchaser to deprive them of protection, by the exhibition of his unrecorded deed.

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If we are to follow the opinion intimated in *Campbell vs. Moseby*, it will only be so far as is warranted by the supposed analogy and principle, upon which that opinion is based; and for the reasons urged, we confidently believe, it cannot operate upon a creditor, except where he had notice at the time of contracting the debt. With this restriction, it has no application to this case. For it is not even alleged, that Samuel had such notice at the time the debt to him was incurred. Nor are there any circumstances in the cause, from which to draw such an inference, even if it were proper to inquire into, or weigh them, when the fact is not put in issue by the pleadings. George W. Graham was still in actual occupancy of the property up to the time when Samuel obtained his judgment and execution.

We are, therefore, bound to pronounce, in the express language of the statute, that the deed to Francis Graham is void, and that it can afford him no lien whatever, as against Samuel's judgment.

This view of the case supersedes the necessity of expressing any decided opinion upon the effect of the change in the real character of the transaction between

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A judgment is not void, (tho' it may be reversible,) for a defect in the mode of entering it.

the Grahams, in changing the absolute deed into a mortgage, or lien, for indemnity.

We should doubt whether Samuel's judgment was reversible for the defect in the mode of entering judgment, suggested in argument. We entertain no doubt that it is not void.

The decree must be affirmed.

CHANCERY.

### Haskins and Others *against* Spiller.

[Mr. Monroe and Mr. Brents for Appellants : Messrs. Morehead and Brown for Appellee.]

FROM THE CIRCUIT COURT FOR GREEN COUNTY.

April 22.

Judge NICHOLAS delivered the Opinion of the Court.

Wm. Spiller's Will—in which an afterborn son was pretermitted, who claims under the will

In March, 1797, William Spiller, a citizen of Virginia, made his will, whereby he devised to each of his four then children, a tract of land, by name ; gives to his wife, in the event of her marrying again, a tract of three hundred acres in Kentucky, some furniture, and one fifth part of his stock ; and lends her, during life, certain slaves ; but in case she did not marry, it was his desire, that his estate should be kept together, for the support of her and all his children, until they successively attained twenty one years, or married, "when I wish all my slaves (except the one given to my daughter Mary) may be equally divided among them and my wife, allotting her an equal proportion with each of them." And so on, as they successively attained twenty one, or married; "and the part allotted my wife is to be equally divided, at her death, among all my children. All my property not specifically devised, as also what I have lent to my wife, I design, may be equally divided among all my children, at her death."

In 1799, George A. Spiller, a son of the testator, was born, and in 1800, the testator died.

Among the tracts so devised, was one in Kentucky, to B. C. Spiller, who having sold and conveyed it to sundry persons, this suit in chancery was brought, by George A. Spiller, against them, asserting claim to a portion thereof, as a pretermitted child of the testator, and praying a division and allotment to him, of his interest in the tract, and compensation for rents and profits.

The court decreed that he was entitled to one fifth part of the tract ; that he ought to pay for any ameliorations or improvements on the part allotted to him, and have a credit for the rents and profits, and waste and deterioration of soil thereon ; and appointed commissioners to lay off and divide the fifth part, from off some side or end of the tract, leaving the balance in convenient form, and having due regard to quality &c.

From this decree the defendants have appealed ; and the main question presented for consideration, is, whether, George A. Spiller, having been born subsequent to the making of the will, is embraced by the provisions of the third section of our act of wills, 2 Dig. 1242, passed in 1797, and entitled to succeed to the same portion of his father's estate, as if he had died intestate. This essentially depends upon the construction to be given to the will, and the act—to ascertain, first, whether he be provided for at all by the will, and if he is, then whether it is such a provision as comes within the true intent and meaning of the statute.

The affirmative of both branches of this proposition is confidently insisted upon, in behalf of the appellants, and we have been cited to many cases adjudged in England, where, under similar devises, a child born after the making of the will, or even in *ventre sa mere* at the death of the testator, was permitted to take with the other children. From an attentive investigation of those and many other cases, we feel bound to admit, that the English courts now, or before the revolution, would have determined that George A. Spiller did take under the different devises in this will to all the testator's children. The contrary construction is, however, not without the support of very respectable authority. In the case of *Northey vs. Strange*, 1 P. Williams, 340, it is said, that a devise

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A devise, or bequest, to a testator's children, is not confined to those born at the date of the will. — Those born after the date of the will, and pretermitted, and not provided for by settlement, — even those born after the death of the testator, are entitled to shares equal to those born before the date of the will — by the common law rule of construction in England; in Ky. by force of the statute, such children are entitled to such shares as they would have taken if no will had been made.

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to one's children or grandchildren, should, *prima facie*, only relate to such children or grandchildren as were living at the time of making the will ; but if the devise were to children living at testator's death, that rule was otherwise, and after-born children would take. In the case of *Armistead vs. Dangerfield*, 3 *Munford*, 22, Chancellor Taylor laid down the rule to be this : " that where a testator speaks of children, generally, he is to be understood as referring to those, either living at the time of making the testament, or at his death, as circumstances, to be collected from his will, may justify." The construction given by him to the will in that case, according to this rule, was affirmed by the court of appeals of Virginia. But the weight of authority is decidedly the other way. The rule to be gathered from the English books, is, that where a devise is to a man's children generally, that it applies to all children *in esse* at the time of his death, and the courts will not, unless compelled by testator's words, restrict his bounty to those who were living at the time of the will, to the exclusion of others born in testator's life time. See *Lowndes on Legacies*, chap. 5, ps. 121, 132—1 *Roper on Legacies*, 46, and authorities cited.

It is very obvious, that this rule of construction has, in many cases, strained, and must, in many more that may occur, strain the language of a testator beyond its necessary, natural import, and as in this case, even beyond what was most probably his intention and meaning at the time of writing the will. The rule must, therefore, have been adopted by the English courts upon principles of policy affecting this class of cases, entirely extraneous from the ordinary rules and principles of construction. Nor is it difficult to ascertain the policy or particular reasons for adopting this peculiar rule.

At the common law, or more properly speaking, according to a principle of justice engrafted upon it by the ante-revolutionary English decisions of the last century, a total change of a testator's circumstances, after the making of his will, was deemed an implied revocation of it. This total change of circumstances was held not to occur where there were children at the date of the will, by the subsequent birth of a child or children. The



rule operated uniformly as to all devises. There was no distinction whatever made between devises of realty, and of personalty. Whatever would revoke a will as to one, would also as to the other, and *vice versa*. See the elaborate discussion of the case of *Shepperd vs. Shepperd*, by Sir George Hay, in 1770—reported 5 *Durnf. and East*, 51; also *Roberts on Wills*, 303; 4 *Kent's Com.* 506; and *Brush vs. Wilkins*, 4 *John. Chy.* 510.

Such being the limited extent to which the principle of implied revocation from change of circumstances was confined, to prevent the great injustice which must frequently take place, by the unintentional disinheritance of a testator's after-born children, the courts made the will speak as at the time of his death, and permitted after-born children, and even a child in *ventre sa mere*, to take under a devise to children generally. An equitable extension of the same principle made the rule apply to a devise to the children of a third person.

This still left a large class of cases, where the after-born children would still be unintentionally disinherited. To remedy this evil entirely, and give to the principle of implied revocation, an extension equal to its intrinsic equity, our statute of 1797, declares:—"Every will made when the testator had no child living, wherein any child he might have, is not provided for, or mentioned, if at the time of his death he leave a child, or leave his wife enceint of a child afterwards born, shall have no effect during the life of such after-born child; &c. When a testator having a child or children, born at the time of making and publishing his will, shall, at his death, leave a child or children born after the making of his will, or shall leave his wife enceint, the after-born or posthumous child, if unprovided for by settlement, and be neither provided for, nor disinherited, but only pretermitted, by the will, shall succeed to the same portion of his father's estate, as such child would have been entitled to, if the father had died intestate; towards raising which portion, the devisees and legatees shall contribute proportionably out of the parts devised and bequeathed to them."

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II Dig. 1242-3

Since the passage of this act, there no longer exists the same reason as existed theretofore, for so construing

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a will, as to make a devise to a testator's children generally, embrace such of them as are born subsequent to the publication of the will. The statute has done away with all reason, or necessity, for any such rule of construction, by the substitution of a much more beneficial provision in favor of after-born children. There is a familiar maxim, that where the reason for a rule of law ceases, the law ceases with it. Shall this maxim be applied here, and made to rule the decision of this case? There are most cogent reasons in favor of its application. Otherwise, this wise and just enactment will, many times, be defeated of its beneficial operation.

A residuary devise to the testator's children, in general terms, (intended merely to dispose of such estate as may have been accidentally omitted in the more specific devises,) will not prevent the after-born, or posthumous, children from taking (under the statute of K.) shares equal with those born before the date of the will.

It is insisted, in behalf of the appellants, that if there is any provision whatever, however small, made for an after-born child, it is not pretermitted within the terms of the act, and cannot take under its provisions. Nor can this be gainsaid where the provision is expressly and unequivocally made. Now, nothing is more common than, that after a man has specifically devised among his children, the great bulk and body of his estate, in order to cover whatever may have been accidentally omitted, he devises the residue to be equally divided among his children. This, according to the English rule of construction, amounts to a bequest in favor of an after-born, or posthumous, child; and though it amount but to a pittance out of a large estate, yet according to the argument with which we are pressed, it is a provision made by the will, the child is not pretermitted, and cannot take by virtue of the statute. The case in hand is one precisely of this character. The testator, manifesting an equal affection for all the children he then had, makes a large devise of real estate to each of them, and then directs, that after they and their mother have been maintained out of the residue of his estate, it shall, at her death, be equally divided among all his children. So that the after-born child, who seems not to have been at all thought of by the testator, at the making of his will, instead of getting, under the statute, a full fifth of his whole estate, is to receive only a fifth of this residuary devise. It must be obvious to every one, upon the slightest reflection, that if we adhere to this rule of construc-

tion, we must essentially and most materially obstruct the statute in operating those valuable and beneficent results which it was made to effectuate. We cannot consent to be instrumental in so curtailing its operation.

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Should we be mistaken in this view of the case, and be bound, on the principle of *stare decisis*, to adhere to the English rule, there is yet another view of it, in which we feel still more confidence, and which will lead us to about the same result. That is, we think we should give such a construction to the statute, as never to permit its operation in favor of an after-born child to be defeated by one of these illusory provisions, proceeding from the application of a technical and mere artificial rule of construction, and not from the declared and unambiguous expression of intention on the part of the testator himself. In other words, we shall feel it our duty not to consider a devise of this description, as a provision made for an after-born child, within the meaning and contemplation of the statute; unless it be free from doubt on the face of the will, that the testator had such child in contemplation, at the time of making the will, and intended such devise as a provision for it.

We feel strongly fortified in this conclusion, by the determination of the court of appeals of Virginia, in *Armistead vs. Dangerfield*, before cited, upon a case perfectly analogous to this. It was there held, that a devise, in a will very similar to that of Spiller, to a testator's children generally, does not comprehend a posthumous child, so as to prevent it from claiming, as a pretermitted child, under the act of Virginia, essentially the same as our own.

That case contains an answer, also, to the objection taken by the appellants, for an alleged want of proper parties—the other devisees of Spiller not being before the court. It shews that it is not necessary to bring all the devisees before the court, and make them rateably contribute towards raising him a fifth of the whole es-

The after-born child, pretermitted in the will of the father, may recover, in chancery, from each devisee, or from the purchasers under a devise, the proportion

which such devisee is bound to contribute, *without making the other devisees parties.* Want of notice, will not avail the purchaser under a devise, against the claim of a child pretermitted in the will, for contribution out of the estate purchased.

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A tract of land having been devised by a testator, sold out by the devisee, and divided among several purchasers—another claimant obtaining a decree for a share of the devise, his portion may be laid off in one body, from any part of the original tract, in the most convenient mode, with respect to the improvements, &c., and need not be taken in parcels from each purchaser.—Those from whom it is taken, will be entitled to indemnity, *pro rata*, from the others.

tate; but that he can sue, and recover from each, a fifth of that which was devised to him.

It also answers the objection, that the defendants here are purchasers, without notice.

It confirms the correctness of the decree of the circuit court in its details, except as to the allotment to the complainant of the fifth of the tract in one entire body, instead of taking a fifth from each defendant, of that which he holds. And in this we approve the decree; inasmuch as there is no particular circumstances shewn, sufficient to influence the chancellor to a different course. The defendant or defendants from whom the fifth shall be taken, will be entitled to indemnity, by *pro rata* contribution, from the other defendants.

The defendants filed a plea, in the nature of a plea in abatement, stating that the complainant was a non-resident, and had given no security for costs. The court permitted the complainant to give the security, *nunc pro tunc*, and overruled the plea. We feel no doubt the court was right in so doing. Pleas in abatement are not properly applicable to chancery proceedings; nor are they allowed the effect of absolutely dismissing the bill, without leave to amend.

The decree must be affirmed, with costs.

Pleas in abatement in *chancery* do not have the effect of dismissing the bill absolutely.

That complainant is a non-resident, and has not given security for costs, being pleaded, in chancery, he may give the security *nunc pro tunc*, and save the dismissal.

May 13.

A petition for a re-hearing in this case was presented, and, after consideration, overruled; when the following addition to the former opinion was made by the court, and delivered by the same judge.

Where a claimant, under a will, in which he was pretermitted, obtains a decree against a devisee, or his vendee, for a share of the land, to be allotted to him, it should be so laid off as to

We perceive no reason for altering the former opinion herein; nor for apprehending that the circuit court will commit any error in carrying its decree for a division into effect. But to preclude all difficulty on that subject, we will suggest, that the improvements made by any of the defendants, should, if they desire it, be left untouched by the part to be allotted to the complainant; provided his part can otherwise be laid off in convenient

form. If any improvement should fall in the portion allotted to him, he must compensate the proprietor therefor, according to the enhanced value the improvement may give to his share, at the time of making the allotment; subject to a deduction for the amount of waste and deterioration, the soil may have suffered whilst used by the defendants, and of a reasonable rent for the occupancy of his share, whilst in the possession of the defendants, according to the assessed value of the rent, if any thing, provided the land had remained in the situation it was when the defendants took possession. But if it were improved at the time of taking possession, and the value of the rent of such improved part, would be reduced by deterioration of the soil, a proper annual abatement therefor should be allowed, in assessing the value of the rent. If the occupancy of the land, in the state it was at the time possession was taken, would have been worth nothing, of course, nothing will be allowed for rents.

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leave to the defendants their improvements, as far as a convenient form of division will allow. Improvements included in the claimant's share, so far as they constitute additions to its value, at the time of the allotment; also, the waste, deterioration of soil, rents and profits, from the use of the land, are to be valued, the accounts adjusted, and balance decreed.

## Davis vs. Whitesides.

[ Mr. Monroe for Plaintiff: Mr. Richardson for Defendant. ]

FROM THE CIRCUIT COURT FOR SHELBY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

APPEAL FROM  
A J. P.

April 23.

THE circuit court erred in instructing the jury, that, if Miller was either the partner, or *agent*, of the plaintiff, his ( Miller's ) statements, as proved by another witness, were competent as evidence against the plaintiff. An acknowledgment of an agent is not admissible as proof against his constituent, unless it formed a part of the *res gesta*.

Acknowledgments of an agent, made subsequent to the transaction in which he acted as agent, ( not part of the *res gesta*, ) are not evidence against the principal.

If Miller had, as agent, collected the account alleged to be due from the defendant to the plaintiff, any thing which he said at the time of collection, would have been

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evidence against the plaintiff; but no acknowledgment after the payment would have been legal proof. As the acknowledgment which was proved in this case, was made after the payment, or settlement, of the account, (if it was ever paid or settled,) the instruction, as given and as applied to the facts, cannot be sustained.

Wherefore, we feel constrained to reverse the judgment, and remand the cause for a new trial.

ERROR  
CORAM VOBIS.

### *Combs et al. vs. Carter.*

[Mr. Hanson for Appellants : Mr. Simpson for Appellee.]

FROM THE CIRCUIT COURT FOR CLARKE COUNTY.

April 23.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A writ of error *coram vobis* is a matter of right: but if made a *supersedeas*, it should not be awarded, without notice to the defendant: — and want of notice may be ground for discharging the *supersedeas*: but is not good cause for quashing the writ, or for awarding damages upon its dismissal.

In this case, the circuit court quashed a writ of error *coram vobis*, with a *supersedeas*, and adjudged ten per centum damages on the replevin bond which had been *superseded*.

The only cause for that judgment, which was assigned by the court, or which appears in the record, is, that there was no notice of the application for the writ.

The object of the first section of the act of 1803, (2 Dig. 1259,) requiring a notice of such an application, was to give the adversary party an opportunity of being heard, before a *supersedeas* should be granted, to his prejudice. The writ itself is a matter of right. If the writ be issued for good cause, and without a *supersedeas*, want of notice, can be no ground for complaint. A failure to give notice of the intended application should not, therefore, be deemed a sufficient cause for quashing the writ. But, as both parties were in court, judgment on the replevin bond should have been pronounced, either for it, if good, or against it, if bad, unless the writ itself had been insufficient on its face.

Nor was it right to give a judgment for damages. Want of notice might have authorized a discharge of the supersedeas, but unless it had been proper to dismiss the writ, it was not proper to give damages. See 6th section of the act of 1802, (2 Dig. 1258.)

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The first section of the act of 1803, is directory merely; and a writ of error *coram vobis* with a supersedeas, should not be awarded without previous notice. But a want of such notice is not alone sufficient cause for either giving damages or quashing the writ. As the writ is not made a part of this record, we cannot adjudicate upon its sufficiency. And consequently, the only point presented for consideration, is, whether the failure to give notice of the intended application for the writ, was a sufficient cause for quashing the writ and adjudging damages.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded.

## Woodard *et als.* vs. Spiller.

EJECTMENT

[ Mr. Haggin and Mr. Brents for Appellants : Mr. Buckner for Appellee. ]

FROM THE CIRCUIT COURT FOR ADAIR COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 23.

THIS was an action of ejectment, brought by Spiller, against Woodard and others in possession, for the recovery of a tract of land, sold and conveyed by Spiller to Craddock. Woodard and the others, together with Craddock, were, by consent, made defendants in lieu of the casual ejector. A joint trial was had, and verdict and judgment rendered for the plaintiff; from which the defendants prosecute this appeal.

Ejectment: tenants and their vendor made defendants, &c.

We deem it necessary to notice only a few of the various questions raised by the assignment of errors.

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If the tenants in possession, together with their warrantor, be admitted defendants in ejectment, there can be no recovery against them, upon evidence which would not authorize a recovery against him also. And depositions, taken without notice to him, should not be read against other defendants—his vendees, who had notice. But, where the fact of their holding under him, does not appear by the bill of exceptions, this court will not reverse for contrary decisions of the court below.

The court permitted depositions to be read as evidence against such of the defendants as had been served with notice, though no notice had been served on Craddock. The court, also, refused, at the instance of the defendants, to instruct the jury, that if they held the land under the claim of Craddock, derived through the conveyance of Spiller, the plaintiff could not recover against any of them, unless there was evidence sufficient to authorize a recovery against Craddock.

It does not appear from the bill of exceptions, that there was any proof to shew that the defendants in possession held under Craddock; and the court was, therefore, right in refusing to reject the depositions, or give the instruction asked. But as the same question may again occur upon another trial, we will state that, if it had appeared that all the defendants in possession hold as the tenants of Craddock, or by conveyance from him with covenant of warranty, the depositions should have been rejected, and the instruction given. There could be no doubt of this, if the defendants in possession hold as his tenants, and we apprehend, for a parity of reason, the same result should take place, if they are vendees looking to him for indemnity, in case of eviction, upon his covenant of warranty. It is true their possession would not, strictly speaking, be his possession; but a verdict and judgment against them, after he had been made a party to the suit, would be conclusive upon him, in a future action on his covenant, to shew that the eviction was had by paramount title. Hence he has a direct interest in the issue of the suit as to every defendant, which would require that the proof should be sufficient to authorize a recovery against him, as though he had been in actual possession.

The court permitted to be given in evidence, to prove the age of the plaintiff, a register of the births of his father's children, made out in the hand-writing of the father, who had been dead thirty years. It is well settled, that such proof is competent.

The defendants offered in evidence, a paper purporting to have been signed by the plaintiff, proffering to prove his signature to other writings, and then by com.

A register of the births, in the hand writing of a deceased father, is admissible to prove the ages of the children.

Comparison of hand-writing is, in general, not evidence to prove a signature. —



parison to shew that this also was signed by him. The court properly refused to permit it to go in evidence upon such proof. In some cases where the antiquity of the writing renders it impossible for a living witness to prove he ever saw the party write, comparison with documents known to have been in his hand-writing, has been permitted. 2 *Starkie*, 657. It has also sometimes been admitted in aid and corroboration of other proof. But alone and without other proof, the general rule is not to admit it.

The defendants offered a witness whose testimony was rejected by the court, on the score of interest, because he was in possession of land lying within the bounds claimed by plaintiff. In this the court erred. His interest was in the question of title involved in this suit, not in its issue. His rights could not be affected by its determination either way.

The plaintiff claimed the land in contest as devisee of his father, William Spiller, who it was proved, had a child still alive, who was born after the date of the will. The court refused to instruct the jury, that said child was entitled to the share of the land, he would have been entitled to if no will had been made. The will is the same as that mentioned in the case of *Haskins et als. vs. Spiller* (decided this term,) and for the reasons there stated, we think this instruction should have been given.

Judgment reversed, with costs, and cause remanded for a new trial consistent herewith

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Where the writing is too old for a living witness to prove it; or in corroboration of other proof, comparison is sometimes admitted.

A witness not interested in the particular suit on trial, is not rendered incompetent by having an interest like that of the party by whom he is offered.

A child born after the date of a will, and pretermitted, is entitled to the same share of the father's estate that he would have had if there had been no will.— See *Haskins &c vs. Spiller, ante*, 170.

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ASSUMPSIT.

## Johnson vs. Lewis.

[Mr. Richardson for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

April 24.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Suit by last endorser, who had paid the debt, against his endorser.

JOHNSON sued Lewis, as the endorser of a negotiable note, for five hundred dollars, drawn by R. H. Grayson, endorsed by Lewis to Johnson, and by the latter to the Bank of the United States.

Special verdict, and judgment for defendant.

Upon the general issue, the jury found a special verdict, upon which the court pronounced judgment in bar of the action.

Facts found by the jury.

Among other facts, the jury found, that the bank had obtained a judgment on the note; issued a *feri facias*, which was returned *nulla bona*, and then issued a *ca. sa.* in virtue of which Grayson was committed to the jail of Jefferson county, and there kept in confinement, until some time in 1822, when, without notice to the bank, or its privity or consent, and without giving a schedule of his estate, or taking the oath of an insolvent debtor, he was liberated by the jailer, in consequence of an order given for that purpose by a justice of the peace; and that, thereupon the bank sued Johnson, as its immediate endorser, recovered a judgment, and made the whole amount.

If the holder of an endorsed note fail to use all and each of the ordinary remedies, direct or collateral, to coerce payment from the maker, the endorsers will be exonerated. —And although the holder af-

As the facts thus found are abundantly proved by record and other testimony, the only question which we shall consider, is, whether the bank pursued its legal and ordinary remedies in such a manner, as to entitle it to recourse upon its endorser (Johnson;) for if it did not, with reasonable diligence, prosecute the ordinary remedies for coercing the debt before it resorted to Johnson, Lewis is absolved from legal liability. He undertook to be responsible, only on the condition that the ultimate

endorsee should use proper means, to make the amount of the note, and should, nevertheless, fail.

"*Due diligence*" is a question of law; and the judgment of the law upon the facts of this case, is, that such diligence was not observed by the bank.

The statute (of 1821,) of this state, abolishing imprisonment for debt, did not apply to the federal courts, or federal process.

By the first section of an act of 1798, (2 Dig. 679,) it is made the duty of the jailer of each county in this Commonwealth, to receive into his jail any prisoner who may be committed under the authority of the United States, and to keep such prisoner safely until "*discharged by the due course of the laws of the United States.*"

And the second section of the same act declares, that jailers shall be subject to the same "pains and penalties," for every neglect of duty, (in such cases,) as they would incur for the like neglect in cases of commitment under state process.

According to the law applicable to federal process at the time Grayson was liberated, it was necessary that he should have given the creditor thirty days notice of his application, and also have taken an oath that he was not worth thirty dollars &c. and the justice of the peace had no power to discharge him.

It is evident, therefore, that the jailer had no authority to discharge Grayson, and that, in letting him depart, he did, in the language of the act of 1798, "*wilfully and negligently*" suffer him "*to escape.*"

It is, also, evident that the bank did not prosecute Grayson to insolvency, and that the jailer had become liable to the bank, as for an escape with his unauthorized leave. According to the common law, the jailer was not, it is true, liable for more than the amount of damage which the bank had actually sustained by the escape; and consequently, if it could have been shewn that Grayson was, in fact, insolvent, the jailer would have been liable for nominal damages only: such would have been his liability even in a suit on his official bond. See *Bernard et al. vs. The Commonwealth*, (4 Lit. Reports, 152.) But a statute of England, re-enacted by this state in 1798,

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terwards obtain payment from his immediate assignor, the latter, nevertheless, loses his right against his assignor, by the laches of the holder.

Due diligence is a question of law.

The Kentucky statute, abolishing imprisonment for debt, is not the law of the federal courts.

Jailer is bound to receive persons committed by authority of the U. S. and keep them until discharged by due course of the laws of the U. States.

If the jailer, without legal authority, discharge a debtor committed under ex' on, he becomes liable for the whole debt.

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declares that, if a jailer shall wilfully permit a prisoner, committed to his custody upon *an execution*, to escape, the creditor may, in an action of *debt* against him, recover the amount of the execution. (1 Dig. 473.)

That statute has been invariably construed as subjecting the jailer individually to liability, (in an action of debt,) for the whole amount of the execution, whether the debtor was solvent or insolvent. In this case, therefore, the jailer was liable to the bank for its whole debt, even though Grayson had been *actually* insolvent.

If the holder of an assigned obligation attempts to pursue the obligor to insolvency, and in the course of the proceeding, an officer so conducts as to render himself liable for the debt, the holder of the obligation must avail himself of his rights against the officer, before the assignor will be responsible.

It is not necessary, at this day, to cite authorities to prove that, unless the bank had, with reasonable diligence, resorted to all the ordinary legal means, either direct or *collateral*, for making its judgment against Grayson available, it was not entitled to recourse on Johnson. Nor should it *now* be doubted that, as the bank did not exhaust its legal remedies against Grayson, *and the jailer*, Johnson was not legally responsible as endorser. This point has been virtually decided more than once, by this court, and has been directly settled by the Supreme Court of the United States, in the case of *The Bank of the United States vs. Tyler*, (4 Peters, 366.)

The Bank did not prosecute Grayson to insolvency. It did not prosecute any one of its legal remedies resulting from the *ca. sa.* or the escape. This it ought to have done, as endorsee, before it could claim recourse on its endorser.

Wherefore, the judgment of the circuit court must be affirmed.

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**Blakey against Abert.**

CHANCERY.

[Mr. Crittenden for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 24.

THIS was a bill to enforce a lien upon a tract of land for the purchase money due the vendor. The court decreed a sale, and appointed a commissioner to sell *so much of the land as should be necessary to pay the debt, interest and costs of the common law judgment*. The commissioner sold the entire tract, for a larger sum than the debt, interest and costs. This he had no authority to do, under the decree; and therefore his act was void—as much so as the act of a sheriff who sells more land under execution than is required to pay the debt. For this cause, the order and judgment of the court, overruling the exceptions to the commissioner's report, and confirming said report, and the commissioner's deed to the purchaser, must be reversed, and the cause remanded, with directions to quash the sale of the land and the bond taken from the purchaser, and to order another sale.

If the commissioner, appointed by a chancellor to sell land, is directed by the order, to sell so much as may be necessary to pay the amount decreed, and he sells the whole, for more than is necessary for that purpose, the act is void.—The sale & sale bond will be quashed, and a resale ordered.

This question is presented in the record:—shall lands decreed to be sold by the chancellor, on account of a lien thereon, *be valued*, in the same manner as if they were taken under execution, or may the chancellor's commissioner proceed to sell without valuation? It is necessary to decide it, for the government of the parties, on the return of the cause.

The acts of assembly now in force (since 24th Jan. 1827,) requiring that land on which executions are levied, shall be appraised before the sale; with a view to its being redeemed, do not apply to sales by commissioners under decrees and orders of courts of chancery.—Such sales are to be made without valuation, or right of redemption.

The second and sixth sections of the act of 1821, (1 Dig. 507, 510,) expressly required, that property, real or personal, liable to be sold by an officer, or commissioner, under any order of sale, or decree in chancery, should be appraised, and proceeded on in all respects, as though it had been taken by execution.

On the 24th of January, 1827, the "several acts of assembly which require property, taken under execution,

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or directed to be sold by decree or order of a court of chancery, to be valued," were repealed by the legislature.

The fifth section of the repealing act provides, "that when any land shall be offered for sale by a sheriff, or other officer, it shall and may be lawful for the plaintiff and defendant to appoint valuers &c." This act provides a different mode of valuation, and authorizes a redemption of the land sold, unless it brings two thirds of its value. The act of 1821, authorized a redemption unless the land brought three fourths of the appraised value.

The provisions of the act of January, 1827, relating to the sale of lands were incorporated into the "act to amend and reduce into one the execution laws of the State," approved 12th February, 1828.

The question will be determined by reaching a correct conclusion as to the effect of the act of January, 1827, upon sales of land decreed or ordered to be sold by a court of chancery.

To bring the system of appraising lands when ordered to be sold by the chancellor, into operation, required clear and explicit declarations on the part of the legislature. Accordingly, in 1821, the legislature manifested their intention by language which cannot be misunderstood. In the act of January, 1827, the legislature did clearly and expressly repeal the laws requiring a valuation of land when "directed to be sold by decree or order of a court of chancery." If the system was thereafter re-enacted, it was done by this language: "That when any land shall be offered for sale by a sheriff, or other officer, &c." We think the language used will not authorize the construction, that the legislature thereby intended to re-enact the system of valuation in respect to lands sold by the chancellor, and which system had, in the first section of the same statute, been repealed in the most direct and unequivocal terms. The sixth section of the act of 1821 shews, that the legislature took a distinction between sales made by the officers of the law, and the commissioners of the chancellor. We therefore, (*Judge Nicholas* dissenting on this point,) perceive

no ground upon which the terms "*sheriff or other officer*" can be enlarged to embrace the commissioner of the chancellor; and we must confine the terms to those officers who, by law, are authorized to levy executions on land, and make sales thereof, in virtue of their offices.

The plaintiff in error must recover his costs.

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*Buck &c.*  
vs.  
*Sanders &c.*

## Buck and Others *against* Sanders and Others.

CHANCERY.

[Messrs. Morehead and Brown for Appellants : Mr. Monroe and Mr. Sanders for Appellees.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 24.

NATHANIEL SANDERS sold and conveyed to Charles Buck a tract of land, and for the payment of the balance of purchase money then due, received the note of Buck, with others as his sureties.

Statement of the  
case.

Buck afterwards conveyed this tract, together with other adjoining land, to his sureties, to indemnify them against their liability on the debt to Sanders, and also to indemnify one of them against his liability, as the surety of Buck, for the payment of a debt to the representatives of James Blain, deceased.

Robert Sanders, as the administrator of Nathaniel Sanders, obtained judgment against Buck and his sureties, which was replevied; an execution issued on the replevin bond, and by written directions from Buck, the execution was levied on all the land embraced in the mortgage to his sureties; which was sold by the sheriff, and Robert Sanders became the purchaser, and afterwards obtained the sheriff's deed therefor.

Buck then filed his bill, seeking a rescission of his original contract of purchase with Nathaniel Sanders; but as his right to obtain such relief was not seriously insist-

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*Buck &c.*

vs.

*Sanders &c.*

ed upon in argument, and as, upon investigation, we have been able to find no sufficient reason for granting it, there is no necessity for setting forth particularly the grounds relied on by him.

Pending this bill, Buck filed an amended bill, in which his sureties and Blain's representatives united as co-complainants, obtained an injunction against the balance of Sanders' judgment, and prayed to have the sheriff's sale to Sanders vacated and set aside, on the ground that the interest of the sureties, as mortgagees, was not vendible by the sheriff under execution, and that he had not sold, or proposed to sell, Buck's mere equity of redemption, but the whole fee simple of the estate. They further prayed that the property might be sold to pay and satisfy the debts due to Sanders and Blain's administrators. On final hearing, the circuit court dissolved the injunction, with damages, and dismissed the bill.

The interest of a mortgagee is not subject to a levy and sale under ex'on :—neither where he is sole defendant, nor where the attempt is to levy on and sell the entire estate, under execution against mortgagor and mortgagee.

A defendant directed an execution against him self and his sureties, to be levied on an estate that he had mortgaged to them, for their indemnity ;— which, without consent or knowledge of the mortgagees, was done, and a sale made of *all the interests*, or the fee simple entire : held that this did not amount to a waiver or release

This decree has been attempted to be sustained on two grounds :—*first*, that the mortgagor and mortgagees, being all defendants in the execution, and the whole estate, both legal and equitable, thereby brought together, the whole was liable to the execution, and the absolute title passed to Sanders, under his purchase and the sheriff's deed. *Second*, that if the sale was irregular and void, that then nothing passed thereby, and there was nothing upon which the chancellor could operate, so as to confer jurisdiction as against Sanders.

The first position was not attempted to be sustained by any direct authority upon the point; nor are we aware of any such. It has uniformly been held, that the interest of the mortgagee was not liable to execution, where he was the sole defendant in the execution ; and we can perceive no sufficient reason for deciding it to be liable thereto, merely because the mortgagor is a co-defendant with him in the execution. That circumstance does not change the quality of the estate held by the mortgagee ; and that quality is the true test of its liability. Nor does it merge the severed and distinct estates held by mortgagor and mortgagee, into one.

It was contended, that the surrender of the property by Buck, without communicating notice of the existence



of the mortgage, should estop him from denying the validity of the sale, as of an entire estate in him, and should be treated as equivalent to a release of his equity of redemption to the mortgagees; thereby placing the whole estate in them. But the mortgagees allege, that the surrender and sale were made without their privity or assent; and if, therefore, this argument would otherwise be of any validity, it can have none here, as no estoppel upon Buck could work prejudice to them, and as an actual release by Buck could not have had any effect, unless they had accepted it. It is true Sanders denies, that he had any notice of the existence of the mortgage; but as the mortgage was recorded in due time, that is an immaterial circumstance as between him and the mortgagees; though if he had elected so to do, it might, in connection with the other circumstances, have entitled him, as against Buck, to hold his (Buck's) equity of redemption, by virtue of his purchase. This right of Sanders, to elect to hold Buck's equity of redemption, does of itself furnish sufficient ground for making him a defendant, and giving the court jurisdiction as against him. We need not, therefore, express any opinion whether there are not other sufficient causes for entertaining jurisdiction.

But we see no cause for the injunction obtained by the complainants, against Sanders' judgment, and think the court did right in dissolving it, with damages. It is a new pretence, that because part of the defendants to the judgment are sureties, and have a mortgage from their principal, to indemnify them, that they shall enjoin the plaintiff from proceeding against them, until they can subject the mortgaged property. Whether such a thing could be done under any circumstances, need not now be determined, for there are none here to authorize it.

The decree must be reversed with costs, and cause remanded with directions for a decree dissolving the injunction, with damages; vacating and setting aside the levy and sale under the execution, and ordering a sale of the mortgaged property, or so much thereof as may be necessary to pay and satisfy the administrator of Sanders and the administrator of Blain, the debts severally

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(of which there was no acceptance,) of the mortgagor's equity of redemption, so as to invest the mortgagees, or purchaser at the sale, with the whole title; and the sale, being of the fee simple, was *invalid*. A release which is not accepted, has no effect.

Denial of notice of a mortgage *duly recorded*, is of no avail against the mortgagee.

Want of notice of a mortgage on an estate purchased at a sale under an ex' on against the mortgagor, may, in some cases, entitle the purchaser to elect to hold the equity of redemption—hence he is a proper party to a bill to foreclose the mortgage.

Sureties indemnified by mortgage, cannot delay the creditor, while they subject the mortgaged property.

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due them, and the costs of this suit ; and if the property should not sell for enough to satisfy both debts, then to distribute the proceeds *pro rata* between them.

Afterwards, upon consideration of suggestions filed by counsel, the court (by *Judge Nicholas*) directed the following modification of the mandate :—

Parties, failing upon their original bill, but succeeding upon an amendment (in which new complainants joined,) have a decree for so much of the costs in this court, as the amendment gave rise to.

The reversing order must be so far altered as to affirm with costs, so much of the decree as dismisses the bill as to Sanders' heirs, and so much of the decree as dissolves the injunction with damages must also be affirmed.

*And it was further ordered*, that the defendant, Robert Sanders' administrator, pay to the complainants their costs in this court accruing in the cause after the filing of the amended bill in the court below.

## CHANCERY.

## Thompson against Harlan.

[ Messrs. Morhead and Brown for Plaintiff : Mr. Harlan for Defendant. ]

FROM THE CIRCUIT COURT FOR TODD COUNTY.

April 15.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A party purchased property at a sheriff's sale, and afterwards applied to the chancellor to be relieved against the sale bond, alleging that he bought upon the representations of the plaintiff, that the property was subject to the execution, when, in fact, it belonged to a stranger : held, that he must make out

THE circuit court decreed to the defendant in error, relief against the plaintiff, for the amount of a sale bond, which he had given to the plaintiff for property which he bought at a sheriff's sale, under a *feri facias*, levied at the plaintiff's instance and for his benefit.

The bill alleges, that Thompson represented that the property (a field of growing corn,) was subject to sale under his execution ; but that, in truth, it was the property of one Watkins, and not of Parham, who had planted and cultivated the corn, and who was the defendant in the execution.

The answer denies that the corn was the property of Watkins ; and avers, that the defendant in error knew as

much about Parham's right as Thompson did, and heard all the evidence which was detailed on a trial of the right of property, on the day of sale; and the latter allegation is clearly proved.

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There is no sufficient proof that Parham had no right to the corn, or no interest therein which was subject to execution. Several witnesses swore that, not long prior to the levy of Thompson's execution, Watkins had some executions against Parham, in the hands of a constable; that Parham agreed that his field of corn, supposed to contain about three hundred barrels, might be sold to satisfy those debts; that thereupon, the field was sold by a *private individual*, and was bought by Watkins, who bid the *amount of his debts*; and that, afterwards, Parham gave his covenant to Watkins for two hundred barrels "of corn."

a clear case;—  
doubt and un-  
certainty as to  
the title of the  
defendant in the  
ex'cn, or the  
extent of his in-  
terest in the pro-  
perty levied on,  
will not entitle  
the complainant  
to relief.

These facts do not *prove* that Watkins had a legal right to the specific corn then growing, or to all of it. They do not even prove that he was a *bona fide* execution creditor of Parham—no judgment or executions having been exhibited. And if he had been such a creditor, the covenant, taken after his alleged purchase, indicates an agreement, by him, to take two hundred barrels of corn for any right which he may have acquired to the specific field of corn.

Nor is there any proof that, if Watkins had a right to two hundred barrels of the corn growing in the field which was sold, the plaintiff in error had no interest which was valuable and vendible; but the contrary may be fairly inferred.

Moreover, there is proof that Watkins and the defendant in error compromised their conflicting claims to the field of corn; and that the defendant got a small portion of the corn, and said that Watkins was "*to make him safe.*"

Under such circumstances, the decree of the circuit court cannot be sustained, upon any principle of equity, or by the authority of any adjudged case. Before such relief should be decreed in favor of a purchaser against the judgment creditor, a clear case should be made out against the creditor, and in favor of the purchaser.

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Here there is no proof of fraud ; no proof of a want of consideration, or of a failure of consideration ; nor any proof of even any injury to the defendant.

Wherefore, the decree of the circuit court must be reversed, and the cause remanded, with instructions to dismiss the bill.

CHANCERY.

### *Rice against Williams.*

[Mr. Haggin for Plaintiff : Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

April 26.

Judge NICHOLAS delivered the Opinion of the Court.

The owner of a land warrant applies to a deputy surveyor, to have it entered and surveyed.—

The dep. having another warrant in his possession, anticipates the present applicant, enters that other warrant upon the land which he intended to appropriate, procures a transfer of the warrant to himself, and has the land surveyed, accordingly, the same day. The applicant's warrant is also entered immediately after the other, and the survey made the next day, covering most of the land so appropriated by the deputy. The applicant then

THIS writ of error is prosecuted to reverse a decree, against Rice, for the release and conveyance to Williams, of so much of a hundred acres of land patented to Rice, as conflicts with another hundred acres patented to Williams.

The case, when stated most favorably for Williams, is in substance this :—he had a land office warrant, for one hundred acres, and applied to the plaintiff in error, Samuel Rice, as deputy for his father, Claiborne Rice, who was surveyor of Muhlenburgh county, to enter the warrant, and have it surveyed.—Samuel Rice had at the time, another warrant for one hundred acres, in favor of E. Watkins, which had been placed in his hands some time previous, to be entered, with the view of having it located and surveyed, but which he had neglected to have entered. This application was made at the house of Samuel Rice; they went together to the house of Claiborne Rice, where the surveyor's book, in which applications for surveys were made, then was, with the ostensible purpose of making the entry for Williams ; and on the way, Williams probably disclosed to Samuel Rice, the land he wished to appropriate. When they got near the house, Samuel Rice stepped forward, entered the

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*Williams.*

house first, and demanded, in the presence of the family, to have the warrant in the name of Watkins entered, and finding the book lying on the table, proceeded immediately to enter the application in favor of Watkins' warrant. At this time, Claiborne Rice was at work in an adjoining field, where he was sought by Williams, who demanded to have his application entered, and his warrant surveyed. When they came to the house, Williams again renewed his demand; but the principal surveyor, finding what had been done in his absence, determined that Watkins' warrant was entitled to precedence, and that the entry of the application must stand as made.

As soon as Samuel Rice had made the entry, he sent some miles to Watkins, and obtained, after the lapse of an hour or two, his authority to use and locate the warrant for his, Samuel Rice's, benefit, and caused it to be surveyed the same day. Williams had his warrant also entered the same day, and surveyed the next day, upon most of the land surveyed for Samuel Rice, the surveyor refusing to make the survey sooner.

The case has been argued at the bar, upon the predication, that under all the circumstances, Williams had acquired the prior right to have his application first entered, and his survey first made. We cannot concur in the correctness of this view of the case, and it is consequently unnecessary to investigate the justness of the inferences deduced from it.

If it be conceded, as we think it must be, that a deputy surveyor is competent to receive and enter an application, it is obvious that the warrant in the name of Watkins, was not only fairly entitled to, but did receive, precedence and priority, by reason of the prior application and entry in its favor. It should properly have been entered some time previous to the day on which it was actually done. If then, Samuel Rice, instead of procuring the use of the warrant for his own benefit, had informed Watkins of the vacant land which Williams purposed locating, and had thereby enabled or induced Watkins to have his survey made on that land, there could be no doubt that Watkins would have held it. The case, therefore, is limited down to the enquiry, whether the fact of

files his bill in equity, to compel the dep. to relinquish the interference: held that, as the warrant used by him, came first to his hands, as he was not prohibited by law, from appropriating land for himself, and as he might *legally* use his information, however acquired, as he pleased, chancery could afford the complainant no redress.

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*Williams.*

Rice having procured the use of the warrant, and located the land for his own benefit, places *him* in a so far worse, or different, situation, as to authorize the decree of the circuit court.

If Rice received the information as to the vacant land from Williams, whilst applying to him to have his warrant entered and surveyed, (which, however, is positively denied, and the proof is not satisfactory to rebut the denial of the answer,) it might not be very creditable to his morals, either as a man, or an officer, that he should have availed himself of information so obtained, to benefit either himself or another, to the prejudice of Williams. Still, as this court has frequently remarked, it is not every departure from the strict rules of moral rectitude, that will authorize an action at law, or constitute a ground for relief in equity. If A discloses to B how an advantageous speculation can be made in property, and consults with him, as a friend, as to the expediency of the purchase, if B should forestall him by making the purchase for himself, the code of honor would no doubt condemn the conduct of B ; but the civil code could give A no redress. That case and this are alike, except that the official station of Rice may be supposed to give a deeper tint to the character of the delinquency. But that circumstance alone cannot so alter the attitude of the cases as to produce an entire difference in the result. Whether survivors and their deputies should not be prohibited from making appropriations for their own benefit, altogether, is another question, which addresses itself to another department of the government exclusively. But so long as they are not thus prohibited, we can only test their conduct in this particular, by the same rules, as are applicable to that of other citizens. We know of no law that requires them to keep their information of vacant land, no matter how obtained, for the exclusive use of applicants generally, or for that of the particular individual from whom they may have chanced to have derived their information.

The decree must be reversed, with costs, and the cause remanded with directions to dismiss the bill.

Spring Term  
1833.

## Lance vs. Cowan.

ASSUMPSIT.

[Messrs. Morehead and Brown for Appellant : Mr. Haggin and Mr. Cowan  
for Appellee.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. April 27.

**THIS** is an action of assumpsit, instituted in the name of David Lance, against James Cowan ; and in which judgment, on facts agreed, was rendered for the defendant.

The facts, as agreed, are these :—Lance robbed one Green of a thousand dollars, exchanged two hundred and fifty dollars thereof for that amount in notes of the Bank of the United States ; was apprehended, indicted and convicted, and thereupon sent to the penitentiary for the felony. During the pendency of the prosecution, the two hundred and fifty dollars were deposited for safe-keeping, with the defendant, Cowan, who was the prosecuting attorney. Lance drew an order on Cowan, and in favor of Hunt, for one hundred dollars, which he protested ; and, after the conviction, Cowan restored to Green the two hundred and fifty dollars ; and thereupon this suit was brought, (for the benefit of " Hunt and Curd,") to recover the amount thus delivered by Cowan to Green.

The fact that the suit purports to be for the benefit of Hunt and Curd, cannot help the nominal plaintiff ; for, unless he could recover for his own benefit, he cannot obtain a judgment for others. Nor can the drawing of the order affect the merits of the case. Cowan ought not to have accepted it, and did not accept it ; and therefore, he incurred no liability in consequence of it.

Upon the conviction, Green had a legal right to restitution. When the thief shall have converted the thing stolen into any other thing, "*the owner may have the pro-*

Suit, against a com'th's atto. in the name of an individual who had stolen money, and exchanged part of it for bank notes ; to recover (for the use of others,) the amount of the notes, which had been deposited with the atto. and who, upon conviction of the thief, gave them up to the man from whom the money was stolen.

the thing stolen, or its produce: the thief, or robber, and his assigns, have no claim to it, and can maintain no action to recover it.

Upon the conviction of a thief or robber, the owner is entitled to restoration of

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Lance

vs.

Cowan.

The right owner  
of stolen prop-  
erty may have  
restitution from  
a *bona fide* pur-  
chaser.

duce instead of the specific chattel." 1 Chitty's Crim. Law, 820; and restitution of stolen goods may be obtained, from even a *bona fide* purchaser from the felon—" *spoliatus debet, ante omnia, restitui*. Chitty, *supra*, and 4 Blackstone's Com. 363.

The fourteenth section of a Kentucky statute of 1805, declares that the court "rendering judgment" of conviction, shall not order restitution after "the term at which the conviction was had." But that statute does not affect the owner's right of recaption, or his right of action: such rights previously existed and still exist. See the authorities, *supra*.

Cowan was the depository of the law. Green had a right to the deposit; the robber had no right to it; and, as soon as the judgment of conviction was pronounced, Cowan had a perfect right, legal and moral, to restore the money to the true owner. Surely, the law did not impose on Cowan the duty of restoring the spoil to the thief, nor imply an *assumpsit* to do so. If it did, it would be obnoxious to the charge of rewarding felony; and then it might be truly said that Lance, after being convicted for robbing Green, can also rob Cowan according to law.

In such a case there is no foundation whatever for an action of *assumpsit*. Lance had no right to the two hundred and fifty dollars, and cannot, therefore, recover any part of it from Cowan, who delivered it to the person who, alone, had any right to it, or to any part of it.

Judgment affirmed.



Spring Term  
1833.**Stone's Administrators &c. against Halley.** CHANCERY.

[Mr. Chinn for Plaintiffs : Mr. Hanson for Defendant.]

FROM THE CIRCUIT COURT FOR CLARKE COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

April 29.

**HALLEY** filed his bill against **Jesse Stone** and the widow, administrators and heirs of **William Stone**, deceased, to subject the interest of **Jesse** in the estate of **William**, as one of his children, to the payment of an unsatisfied judgment, which he held on **Jesse**. Pending the suit, the widow died, and by an amended bill, he prayed to subject the interest of **Jesse** in her estate also.

Statement of the  
case.

**William Stone** and his said wife had ten children: three sons (**Jesse**, **James** and **Micajah**,) and seven daughters. **Jesse** and **James** each received from their father, in his life time, a tract of land, by way of advancement, of the value of fifteen hundred dollars. **Jesse** also received, in money and personalty, two hundred and eighty five dollars, fifty cents; **James** two hundred and fifty dollars; **Micajah** seven hundred and fifty dollars, and the seven daughters one hundred and fifty dollars each. After the death of **William Stone**, his land was sold, by assent of his heirs, for two thousand nine hundred and sixty dollars. Two thirds of his slaves, of the value of three thousand one hundred and fifty dollars, were distributed among **Micajah Stone** and the seven daughters; after the widow's death, the other third of the slaves were sold for one thousand nine hundred and thirty five dollars, eighty one cents; and the net proceeds of his personalty was one thousand six hundred and seventy two dollars, thirty two cents. From which it appears, that **Jesse** and **James** had each been advanced in land, more than their respective shares of the whole real estate and slaves, and in personalty nearly to the amount of their respective shares in the whole personal estate.

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1833.

Stone's rep's.

vs.

Halley.

The net proceeds of the widow's estate, after deducting a legacy of six hundred dollars, to Micajah Stone, was two hundred and sixty three dollars, sixty four cents. This, together with the proceeds of William Stone's personal estate, and all the advancements in money and personalty to his children, was thrown by the circuit court, into hotchpot; and a small balance was thereby produced in favor of Jesse Stone, for which, and one tenth of the value of the slaves, Halley obtained a decree.

In reviewing this decree, the principal question presented for determination, is the propriety of that part of it which gives Halley one tenth of the value of the slaves. This necessarily depends upon whether the advancement to Jesse Stone, in land, ought to have been brought into hotchpot, in making partition of the slaves.

It was determined in the cases of *Quinn vs. Stockton*, 2 Lit. 348, and *South vs. Hoy*, 3 Mon. 93, that advancements in slaves were not to be brought into hotchpot, in the distribution of personalty, and *vice versa*; for the obvious reason, that slaves are not personalty. But we are not aware of any decision, that advancements in land shall not be brought into a division of slaves. The act of 1798, which converts slaves into real estate, 2 Dig. 1155, declares, they shall descend as lands are directed to descend in and by an act of the General Assembly, entitled, an act directing the course of descents. Former decisions have fixed this, as a reference to the act of 1785, 1 Dig. 435, the fifteenth section of which is in these words:—"Where any of the children of the intestate or their issue, shall have received from the intestate, in his life time, any real estate by way of advancement, and shall choose to come into partition, with the other parceners, such advancement shall be brought into hotchpot with the estate descended."

We know no process of reasoning by which advancements of land or slaves, can be exempted from the operation of the express letter and unambiguous import of these acts, when a partition is sought of either. Nor can we concede, that there is any principle of policy which ought to induce an effort to create a distinction, not to be found in a literal interpretation of these acts. On the

Advancements in slaves are not to be brought into hotchpot in the distribution of personalty, nor *vice versa*. But—

Advancements in land, or slaves or both, should be brought into hotchpot in the division of either, or both.

contrary, since the decisions which have exempted slaves and personalty from going into hotchpot with each other, every dictate of policy, as well as justice, requires, that slaves and land should be brought and kept together with regard to this subject. Unless this be done, that perfectly fair and equal division of an intestate's estate among his children, which our law contemplates, must, many times, be essentially frustrated. We, consequently, consider the circuit court erred in this part of its decree.

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1833.

Stone's rep's.  
vs.  
Halley.

The next question is, whether the advancement of seven hundred and fifty dollars, to Micajah Stone, should have been thrown into *hotchpot* with the personalty and other advancements. It is not pretended that, in the general, this could properly be done; for a distributee certainly has the right to retain his advancement, and waive any claim on the personalty. But it is thought there are circumstances here which authorize this part of the decree of the circuit court. Previous to the death of the widow, it was a contested matter among those concerned, whether Micajah was bound to account, as distributee, for six hundred dollars, of the seven hundred and fifty dollars advanced to him. The widow, after devising six hundred dollars to Micajah, and directing the balance of her estate to be divided as if she had made no will, proceeds thus:—"I further wish to leave on record, my reasons for making the donation I have to my son. It is in consequence of my husband's releasing him from the payment of a note, by destroying the same, which he did, as I believe, with a design he never should account for it in any way. On hearing that some of my sons-in-law, intends pushing a law suit to bring the above named note, or rather its amount, into a *general*, which act I disapprove of, and take this method to settle the difference."

Distributees may waive his right to distribution, and retain his advancement.

A testatrix, in making a bequest to her son, used language showing her expectation, and reason for the bequest, to be, that an advancement made by her husband to the son, would be brought into hotchpot: held, that he could not retain the advancement and claim the legacy too.

We think it fairly inferrible from this language, that the testatrix intended the six hundred dollars to be paid to Micajah, only on condition of his being made to account for a like sum, as a distributee of his father. She certainly did not contemplate his withholding the six hundred dollars advanced by the father, and receiving

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1833.

*Stone's rep's.*  
vs.  
*Halley.*

that devised by her also. Her intent was to make good, what she believed to have been the intention of her husband, that Micajah should receive six hundred dollars more of his estate than his other children, and which intention she supposed would be defeated unless she made him an equivalent in this way. If she had intended it as an unqualified and unconditional act of bounty on her own part, there would have been no need for setting forth so particularly her reasons for the devise to him, and they would most probably have been omitted, as they would have been no way pertinent, but wholly inapplicable as reasons for an unqualified bounty from herself. As then he could not take the devise, and withhold accounting for the advancement both, and as it was most for his interest to take the devise and account for the advancement, the court did right in treating it in that way.

A distributee agreeing to take a specific sum, (horse and saddle,) and waive his right to distribution, heard his creditor attaching the fund, by bill filed after the agreement, are bound by it.

This mode of adjusting the personalty, produces a small sum in favor of Jesse Stone ; and if there was nothing in his way, Halley would be entitled to the decree rendered in his favor therefor. But it is proved, that, at the time of distributing the slaves and personalty, Jesse Stone was present, and in consideration of a horse and saddle then given him, and what he had received in his father's life time, waived any claim as a distributee of the estate. The horse and saddle were worth within a few dollars as much as he could have obtained from his father's estate. This transaction took place before the institution of Halley's suit, and we think he, as well as Jesse Stone, should be bound by it. The consequence was, that Halley was entitled to no relief as against the administrators and heirs of William Stone ; and the extent of his recovery must be confined to Jesse Stone's one tenth of the net proceeds of his mother's estate.

Bill, by a creditor, against adm. heirs, &c. to subject the interest of one of them to payment of a debt, costs to be given against the debtor only.

The decree must be reversed, with costs, and the cause remanded, with directions to dismiss the original bill, with costs, as to the administrators and heirs of William Stone ; and upon his amended bill, to render him a decree against the executor of Mrs. Stone, for twenty six dollars, thirty six cents, but without costs against any of the defendants, except Jesse Stone.

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1833.

1d 201  
119 496

## Gore against Stevens &c.

CHANCERY. Dana  
1d 201  
1131 608

[Messrs. Wickliffe and Wooley for Appellant: Mr. James Trimble, Mr. Hansen, and Mr. U. B. Chambers for Appellees.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

April 30.

STEVENS and his wife filed their bill, to have partition of a thousand acres of land, among the devisees of John Gore, senior, according to the provisions of his will.

Facts and circumstances of the case.

With the decree of the court, all the parties, except Benjamin Gore, the appellant, seem to be satisfied. He claims more land than the court has decreed to him, under the following facts.

It seems that the testator was the patentee of one thousand acres of land, situated in the county of Montgomery. As early as 1797, the appellant removed from Virginia,—where his father, the testator, lived, and where he died, and settled upon a part of the thousand acres. Some time thereafter, John Gore, junior, who had removed from Virginia, and settled on the same tract, before his brother Benjamin, caused two hundred acres to be laid off, by metes and bounds, for the appellant, including his settlement. In thus laying off the two hundred acres, John Gore, junior, acted as agent for his father, and under authority from him. In 1810, or 1811, two deeds were prepared in this state, and sent, by John Jamerson, to Virginia, for the purpose of having them executed by the patentee—conveying by one of the deeds the two hundred acres laid off for Benjamin Gore, to him; by the other deed, two hundred acres of the one thousand, to John Gore, junior, which had been laid off by metes and bounds for him. Jamerson, as agent for the two sons, carried the deeds to Virginia, and they were executed by their father, and delivered to Jamerson, who deposited them with the clerk of Culpeper county court, for the purpose of having their execution prov-

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1833.

Gore  
vs.  
Stevens &c.

ed before him, by the subscribing witnesses, the testator being too infirm at the time to go before the clerk, to acknowledge their execution. Jamerson returned to Kentucky before the execution of the deeds was proved, leaving them with the clerk. The testator thereafter addressed a note to the clerk, requesting that the deeds might be sent to him, and it was accordingly done. Upon the day of the publication of his will, the deeds were thrown into the fire and consumed.

The will gives one hundred and twenty five acres of the thousand to Fanny Gore, and directs that the balance should be equally divided among his other children, all of whom are named in the will, and from which it appears there were six besides Fanny.

Patsey Reynolds, named by the testator, as a devisee, and one of his daughters—for whom a sixth part of the thousand acres was intended, after deducting the devise of one hundred and twenty five acres, to his daughter Fanny—was dead at the time the will was executed. The court, in the decree, assigned the portion thus devised, to William Reynolds, heir of said Patsey.

In 1804, Warner's lessee recovered a judgment, in an action of ejectment, against Benjamin Gore. Warner claimed under a patent for five hundred acres, elder than that of John Gore, senior. Benjamin Gore confessed the judgment, reserving equity. In 1813, Warner conveyed his five hundred acres to George Horine, who, in 1815, conveyed the same to Benjamin Gore, with the exception of one hundred and twenty acres conveyed to James Bourn, and a parcel to Reuben McDonald.

In 1809, James French conveyed to Benjamin Gore, two hundred and fifteen acres of land, including his residence. The title which French thus passed to Benjamin Gore, is founded on a patent to John Edwards, of older date than that to John Gore, senior.

Benjamin Gore insists, that he has a right to hold the land covered by the deeds from his father, French and Horine. But the court disregarded his title thus set up, and permitted him to claim only under the will of his father.

It appeared, in proof, that Benjamin Gore had received, under the will, slaves and money. There was a devise to him of one hundred acres of land on Salt River; but it does not appear that he ever took possession of it, or in any way used or set up claim to it. There is testimony conducing to shew, that the testator had, in his life time, conveyed his land on Salt River to his son John.

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vs.  
Stevens &c.

Questions to be  
decided.

Two questions arise upon the preceding facts: 1st. Is Benjamin Gore estopped or precluded, from setting up a title adverse to that of his father? 2nd. If he is, does the decree give him as much land as he is entitled to?

There are two grounds upon which it is contended, that Benjamin Gore cannot set up titles inconsistent with his father's patent. *First*—The fact that he entered under his father's title, and held as a tenant, or *quasi* tenant, under him. *Second*—The fact that he received benefit from the will: and therefore, it is contended, he cannot now set up a defence inconsistent with the will.

It satisfactorily appears, that Benjamin Gore entered under the title of his father, and held for some time as his tenant. But, by the judgment in ejectment the relation which he bore as tenant, to his father, was destroyed, and thereafter he was at liberty to make terms with the successful claimant, or others holding superior titles. It was not necessary for him to wait until actually evicted by the *habere facias*, before he could be permitted to purchase in the adverse titles.

A judgment of  
eviction against  
a tenant, de-  
troys the re-  
lation between  
him and his land  
lord; and the ten-  
ant may then,  
without waiting  
for the *ha. fa.*  
to be executed,  
purchase any o-  
ther title for his  
own benefit.

There is no foundation for imputing fraud to Benjamin Gore on account of the confession of judgment. We, therefore, perceive no reason, why he is not entitled to the full benefit of the patents to Warner and Edwards, unless it can be found in the second ground of objection.

It is one of the leading maxims in equity, "that a person shall not claim an interest under an instrument, whether a deed or a will, without giving full effect to that instrument as far as he can."—"If the testator gives what is not his property, but which he supposes to be his, and gives to the person whose property it is, an in-

A devisee can-  
not claim and  
hold, under a  
title adverse to  
that of the tes-  
tator, any thing  
devised to him,  
and at the same  
time, take a de-  
vise or legacy

under the will. He must acquiesce in the testator's right to the disputed property, and surrender it to the devisee to whom it is given, or forego the benefit of any devise or legacy to himself.

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Gore

vs.

Stevens &amp;c.

terest by his will, that person will not be permitted to defeat the disposition where it is in his power, and yet take under the will; and the same rule applies, though the testator knew he had no right to dispose of the lands, and yet knowing it, takes upon himself to dispose of them. No principles are better established by authority than the foregoing, which are extracted from *2 Maddock's Chancery*, 48. It results from their application, that if the testator knowingly attempted to devise land which belonged to his son Benjamin, and in the same will, made a provision for his said son, he could not claim the benefit of such provision, without surrendering the title to the land in favor of the devisee, to whom it may have been given. If Benjamin Gore were proceeding to recover the money which he was entitled to under the will, there can be no doubt, but the chancellor would compel him to abide by all the provisions of the will, before affording him relief. It would be competent to compel him to make his election, whether he would claim under, or against, the will.

Where a devisee, who claims some of the property devised, by a title adverse to that of the testator, accepts and receives other property bequeathed to himself, in the same will, it is tantamount to an election; and he will be compelled to surrender his adversary claim to the other devisees.

But his counsel contend, that he is not asking the chancellor for relief; on the contrary, it is urged that he is acting in defence of his fire-side. We think his attitude can make no difference. As complainant, or defendant, he must equally submit to all the provisions of the will, or renounce its benefits. He has already taken its benefits. Shall he now say, "I ought not to have received them?" We cannot tolerate such a defence. The act of receiving the benefits, or legacies, of the will, is an election to abide by its provisions, if, at the time, he had a knowledge of all his rights. We infer from the proof, that the accounts of the estate had been so far settled and adjusted, that he knew all the facts necessary to enable him to make his election, in such manner as to promote his interest. It may be, that he will gain more by submitting to the will, and a partition of the land, and taking his share of the slaves and personalty, than he would do, were he to renounce all interest in the slaves and personalty, and hold the land to the extent of his claim. Under such circumstances, having accepted his share of the slaves and personal estate, and not having, in his an-



swer, proposed or offered to return them, he should be compelled to abide by it, as an *election*, and should not be permitted to change his mind, as subsequent circumstances may unfold different views. "In a case (says *Maddock*, 2 Vol. 55,) where a widow had conflicting interests under her marriage settlement, and her husband's will, and she proved the latter, acted under it, and received rents for six years, she was considered as having made an election." The same author (2 Vol. 60,) says: "Where a party has made an election, and proceeds, contrary to such election, to recover estates at law, an injunction will be granted to restrain him." The facts shew that the requisite essential to an *election*, may be found in the conduct of Benjamin Gore, in accepting his share of the personalty. *Roper on Legacies*, 2 Vol. 389. We cannot, therefore, suffer him now to set up titles derived from the patents to Edwards and Warner, and the burnt deed in opposition to the will. The case of *Groves vs. Kennon et ux.* 6 Mon. 632, does not militate against the foregoing view.

It remains to enquire, whether the quantity of land allotted to Benjamin Gore, is as much as he was entitled to. Patsey Reynolds was dead before the making of the will. If the devise in her favor be regarded as lapsed, so that it cannot pass to her son, then the portion allotted to Benjamin Gore, should be increased, by adding to his share. There are no words in the will, going to shew that the testator had in his mind a son of Patsey Reynolds. How then can the son take the devise to the mother, she being dead before the will was executed? He cannot do it from any words in the will, and we have no legal authority to substitute him in the place of his mother. It is clear, that he cannot make a title to any part of the land, as heir to his mother, because no estate ever vested in her under the will. These positions are fully sustained by *Roper on Legacies*, 2 Vol. 320. It was erroneous, therefore, on the part of the circuit court, to decree to William Reynolds, the share which the will purports to give to his mother. This would be true even if Mrs. Reynolds had been alive when the will was executed, and had died before the testator. In that event,

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2nd question.

The heir of a devisee, or legatee, who was dead when the will was made, or died before the testator, does not take the property so given—it is a lapsed legacy, or devise.

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1833.

*Gore*  
vs.  
*Stevens &c.*

as there is no provision shewing who was to take the portion designed for her, it would strictly be a lapsed legacy or devise; and as there is a clause in the will giving all the residue of his estate, *real and personal*, to certain named devisees, among whom, neither Mrs. Reynolds, nor her son, is mentioned, such portion might probably pass into the residuum, and go to the residuary devisees, to the exclusion of Mrs. Reynolds' son.

But be that as it may, as Mrs. Reynolds was not living when the will was made, it is a question, whether the devise in her favor, can be considered so far in the nature of a lapsed legacy, or devise, as to pass to the residuary devisees; or whether the portion apparently intended by the face of the will for her, should be considered as so much estate, not disposed of by the will, which should descend according to the statute of descents.

*Personal property* of a testator, which being lapsed legacies, or from any other cause, passes not by the will, goes to the *general*, residuary legatee, if any. Otherwise, as to *real estate*, which, being a lapsed devise, or which, from any other cause, passes not by the will, descends to the heirs.

If it be regarded as a lapsed legacy of personal property, the law as laid down in *Roper*, and all the books we have examined, will give the portion to the residuary devisees; notwithstanding the probability that the testator would have given it to the heir of his daughter, had he known of her death. The courts, however, cannot seize on that probability, and undertake to make a will for him, contrary to the settled rules upon the subject. If it be regarded as estate not embraced by the will; if the testator can be considered as dying intestate in respect to it, then it will pass to his heirs by descent, and William Reynolds, the grandson, will be entitled to a small share of that, which the will purports to give to his mother. In the one case, he loses all; in the other, gets a trifle.

The residuary legatee of the testator's personal estate, if he be *general* legatee, will be entitled to "whatever may, by lapse, invalid disposition, or other casualty, fall into the residue, after the date and making of the will." *Roper*, 2 Vol. 453. If the provision for Mrs. Reynolds had been a bequest of money, there could be no doubt, under the authority of the adjudged English cases, that the residuary devisees would take it, instead of the next of kin, or the executor. As, however, it is a devise of land, will that alter the rule? The authorities say it

does. A residuary bequest of personal estate, (according to *Maddock*, 2 Vol. 93,) carries not only every thing not disposed of, but every thing that is ill disposed of, and every thing that in the event, turns out not to be disposed of, whether by a partial revocation of the will, a lapse, or by a gift being void, or not sufficiently disposed of, or given on a contingency which does not happen, or otherwise." But in this broad rule in favor of the residuary legatee, Maddock has inserted, by parenthesis, that the rule is *otherwise as to real estate*. To shew that the rule is otherwise in respect to land, he cites *Ambl.* 580, and 1 *Vez.* 322. Lord Camden's opinion, as given in *Roper on Legacies*, 2 Vol. 458, takes the distinction between the personal, and real estate, and admits the rule in the one case to be, that the residuary, general legatee will take lapsed legacies, and every thing which does not pass by the will, with the exception of real estate. The reason for the difference, may be found in the desire of the courts to prevent the *residuum* from going to the executor, in the one class of cases, and to benefit the heir at law in the other. We shall adhere to the distinction, and regard the portion of land which would have passed, under the will, to Mrs. Reynolds, had she survived the testator, as so much estate of which he died intestate. Benjamin Gore should have his share of this land; and William Reynolds, instead of the whole of it, as representing his mother, is entitled to a seventh part only, as an heir of his grandfather.

Ringo, &c. who may have purchased from Benjamin Gore, or any other of the devisees, cannot be affected by any partition made among the devisees and heirs, to which they are no parties. Nor will such partition hereafter, prevent them from asserting such rights as they have, when molested. It is very possible, that the vendees of Benjamin Gore may occupy a more favorable attitude than he does; but of this we can only conjecture, until they are properly made parties, and the nature of their claims fully presented. We cannot now say, that the claims of such vendees will have a material bearing upon the division which may be made between the devisees and heirs, or that their rights will be materially

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vs.  
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The vendees of one who, upon taking under a will, was compelled to relinquish the land which he had sold as his own, but which the testator had devised to others, will be in no wise affected by any partition among the devisees, to which they (the vendees) were no parties.

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1833.

*Manifee*

vs.

*Morrison's ex*

affected by the sales which Benjamin Gore has heretofore made. If the land allotted to him, covers all that he has sold, such allotment will inure to the benefit of his vendees.

The decree is reversed, with costs, and the cause remanded, for proceedings not inconsistent herewith.

COVENANT.

## Manifee vs. Morrison's Executor.

[Mr. Monroe and Mr. James Trimble for Plaintiff: Mr. Crittenden and Mr. Chinn for Defendant.]

FROM THE CIRCUIT COURT FOR BATH COUNTY.

May 1.

Chief Justice ROBERTSON delivered the Opinion of the Court—  
Judge Nicholas did not sit in this case.

Construction of a covenant, in a conveyance by executors, for warranty "to the extent of their assets" &c. —and if the land is lost, the purchase money to be refunded with interest.

THIS is an action of covenant, instituted, in 1830, by George Manifee against Henry Clay, as executor of James Morrison, for a breach of a warranty of title, contained in a deed of conveyance alleged to have been made by Morrison to Manifee, in 1805.

The deed which was exhibited on oyer, purports to have been a conveyance by James Morrison and Joseph H. Daviess, as the executors of George Nicholas, and contains the following covenant only :—

"And the said James Morrison and Joseph H. Daviess, executors &c. for themselves, their heirs, executors and administrators, to the extent of their assets, the aforesaid tract of land and premises unto the said George Manifee, his heirs and assigns, against the claim or claims of all and every person or persons whatsoever claiming under them the said executors, and if the land should be lost by any prior claim, the purchase money is to be refunded with interest from this date."

This stipulation is awkwardly drawn; but, taken altogether, it imports a covenant, and but one covenant; and that is, that, in the event of an eviction, Morrison and Daviess, as the executors of Nicholas, should, to the

extent of assets then unadministered, be bound for the original consideration and interest thereon.

Wherefore, it results that the plea of *plene administravit*, filed by Clay, is a good defence ; and that the demurrer to it was properly overruled. And it also follows, that the deed, as expounded by this court, does not sustain the declaration, which seems to be founded on Morrison's sole and individual warranty, without regard to his representative character, or to the special covenant, to be liable only to the extent of assets.

Judgment affirmed.

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A deed by an executor, will not support a dec'n drawn as upon his own covenant.

## Daniel vs. Bratton et als.

EJECTMENT

[Mr. Owaley and Mr. Breck for Appellant : Mr. Turner and Mr. Caperton for Appellees.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 1.

THIS is an action of ejectment, on a joint and several demise, in the names of sundry persons claiming as tenants in common, under the will of one Coulter.

Questions to be decided.

Judgment of eviction, for the entire tract of land, as described in the declaration, having been rendered against the defendant in the action, he has appealed to this court.

Two question only will be considered : 1st. Can the judgment for the entire tract of land be sustained ? 2nd. Did the circuit court err in instructing the jury ?

First. Thomas Stagner, who was living at the time of the trial, was the husband of one of the tenants in common upon whom Coulter's title had been cast. He and his wife resided on the land during the subsistence of their marriage relation : she had died leaving children by him, who may inherit her interest. He was, therefore, entitled to that interest during his life, as tenant by the courtesy ; and his children, who are co-lessors with oth-

*Feme covert*, tenant in common, dying, leaving children by the husband who survives her, he takes the estate for life—the children can make no valid lease of it.

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Lessee of tenants in common, suing for the whole tract, may recover for as much as he shews title in, and demises by, any of the co-tenants. But a judg't for more—for the whole, when there are co-tenants on whose title there is no demise, is erroneous.

A deed transmitted from abroad to an agent in the co. where the land lies, to be there recorded, takes effect, by delivery, as soon as it is lodged in the clerk's office—the assent of the agent to its being recorded, not being essential.

*Query*—upon the acts of 76 and 97, relating to privy examinations of non-resident *femes covert*.

ers, could make no valid lease. He is not a lessor ; and consequently, to the extent of his interest, the title of the lessee failed. Nevertheless, there might have been a recovery according to the right as proved. But the judgment should have been for the undivided interests of such of the lessors as had title, and not for the entire tract of land. A plaintiff may recover less than he sues for ; but should not have judgment for more than he establishes a right to recover. To the extent of Thomas Stagner's interest, no cause of action existed, and there should, therefore, to that extent, be no eviction. Wherefore, in that respect the judgment is erroneous.

So far as a contrary doctrine may have been intimated in the case of *Hume vs. Langston*, lately decided by this court, the proper application of the legal rule was misconceived. Though that case and this are not precisely alike. In this case, if Daniel should be evicted from the entire tract, he could not obtain restitution, because the record would not shew that such eviction was not authorized by the judgment.

*Second.* A conveyance to the appellant from Bratton and wife, two of the lessors, having been certified, and transmitted from their residence in Missouri, to Thomas Stagner, to be recorded in the county in which the land lies, and having been there recorded,—the circuit court instructed the jury, that it passed no title unless it had been recorded with Stagner's assent. As it does not appear that Stagner had any special authority, or that any condition was prescribed as to the delivery of the deed by him, the instruction cannot be sustained. His consent to the recording of the deed does not appear to have been required by the grantors. And if he were only the selected instrument for transmission, the delivery to him, for the appellant, should be deemed a delivery to the latter, the instant the deed came into the clerk's office for registration.

The privy examination of Mrs. Bratton was certified by two justices of the peace ; and this record does not shew, that they had been empowered by a commission from the clerk of the county in which the deed was to be recorded. Whether the statute of 1776, (1 Dig. 306,)

is still in force, and the sixth section of that of 1797, (*Ibid*, 313,) is only cumulative, or whether the latter should be deemed the only existing law which applies to this subject, we need not decide, because the question may not arise upon another trial, and is not even now directly presented.

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Judgment reversed, and cause remanded for a new trial.

## Frizzle et al vs. Veach

EJECTMENT.

[Mr. McConnell for Appellants : Mr. Hord for Appellee.]

FROM THE CIRCUIT COURT FOR LEWIS COUNTY.

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Chief Justice ROBERTSON delivered the Opinion of the Court—  
from which Judge Nicholas dissented, upon the principal point.

May 1.

THIS is an action of ejectment, in which four points are presented.

Points to be decided.

*First.* Is a sheriff's deed to two persons, for land sold by him, under execution, to one of them, as the nominal purchaser, effectual to pass the legal title to both?

*Second.* Is land which had been granted by the commonwealth to the "heirs" of the person in whose name it had been entered and surveyed prior to his death, subject to sale under an execution against the estate which had descended to the heirs?

*Third.* Have the purchasers of such land, under such an execution, a right, after they had obtained the sheriff's deed therefor, to use the names of the heirs, against their will, in a demise in an action of ejectment, instituted for recovering the possession of the land in the occupancy of a stranger?

*Fourth.* Is the legal title (of the defendant in an execution) to land in the adverse possession of another person, subject to sale under the execution?

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One to whom land is stricken off, at a sheriff's sale, may have the deed made to whomsoever he will.

Land patented to the 'heirs' of one in whose name it was entered and surveyed, they take by descent;— and it is subject to sale under execution against the estate of the decedent to his heirs descended.

The purchaser of land, sold and conveyed by a sheriff, under execution against the estate of a decedent to his heirs descended, has no right to use their names, without their consent, in an ejectment, to recover the land.

The legal title of a defendant in an execution, to land in the adverse possession of another, is subject to levy, and sale, under execution.

—Judge Nicholas of a different opinion—See p. 217 &c.

*First.* The sheriff may make the deed and pass the title to the actual purchaser, or to himself and another secretly associated with him in the purchase, or to any person to which the highest bidder may have sold, or who may have been substituted, by mutual consent, as the purchaser.

*Second.* If the equitable, or inchoate, legal title descended, the fact that the patent vested the perfect legal title in the heirs, did not convert them into purchasers. But the perfect as well as the imperfect right was derived by descent, or in consequence of the right of inheritance. And consequently the land should be deemed estate which had descended to the heirs.

*Third.* If the title of the heirs passed by the sheriff's deed, a demise in their names was unavailing; and if their legal title was not transferred by the deed, no right whatsoever was vested by the sale, or by the deed. And therefore, the names of the heirs should not be used without their consent. If the deed passed the title of the heirs, the purchasers held all the title which the heirs had held, and were entitled to all the protection which they themselves could have claimed before the sale; and consequently, no prejudice can have resulted to the purchasers from a refusal to permit them to prosecute a suit in the names of the heirs.

*Fourth.* In October, 1827, a majority of this court, (Chief Justice Bibb, and Judge Owsley concurring, and Judge Mills dissenting,) decided that the legal interest of a debtor, in land, was not liable to sale under execution against him, whenever it was in the adverse possession of any other person. [*McConnell vs. Brown &c.* 5 Mon. 478.]

The first section of an act of 1798 declared, that "lands, tenements, and hereditaments" might be sold "by virtue of writs of *fieri facias*." The second section authorized a sheriff to make the amount of the execution by a sale of the debtor's lands, tenements and hereditaments in possession, reversion or remainder." Whether the phrase "in possession" meant an actual *pedis possessio*, according to the literal and popular import of the word *possession*, or should be understood, in its technical import, as contradistinguished merely from *reversion* and *remainder*,



and therefore meaning all legal titles not held in reversion or remainder—was a question which, although it had frequently occurred, had never been *directly* and expressly decided, until it was settled in the case of *McConnell vs. Brown*, (*supra*.)

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A diversity of opinion as to the correctness of that decision, and also as to the policy of the law as thereby expounded, may be presumed to have existed, to a great extent, in the community. "An act to amend and reduce into one the execution laws of this state," approved February 12th, 1828, only about four months after the date of the decision in *McConnell vs. Brown*, provides, in the thirty fifth section, that "*all legal title to real estate shall be liable to sale by execution, whether in actual possession or not.*"

That provision should be so construed as to operate in some way, and for some purpose. But it would be more than superfluous if it should be interpreted to mean only the title of a person actually resident on the land, or seized of it by construction, or in fact; for such a title could have been sold under execution had there been no special provision to that effect in the act of 1828. This proviso, in the thirty fifth section, was inserted for some practical purpose. It is a distinct and substantive enactment, and must have a peculiar effect which the statute would not have had without it. For what then must it have been intended? We think that the case of *McConnell vs. Brown* gives the answer.

The legislature must be presumed to have intended that the legal title, of whatever grade or character, should be subject to sale under execution—whether that title be in fee simple, or for years, or in possession, or in action, joint or several, in *presenti* or in *futuro*. "Title" is substituted for "*land*;" and, "*whether in actual possession or not*," was intended to mean, when connected with the word "*title*," that any *legal interest* in land, whether that interest be partial or total, inferior or superior, or whether the land be in the possession of the defendant in the execution or of another person claiming adversely to him, shall be subject to sale under the execution. That seems to be the plain, common sense import of the pro-

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viso ; and we do not feel the disposition, or claim the authority, to blot out the whole proviso, or to resort to artificial, or minute verbal criticism, for the purpose of nullifying the enactment, or of frustrating its specific object, or effectual operation.

Moreover, our construction of that proviso seems to be fortified, and the only plausible argument in opposition to that interpretation, weakened, if not destroyed, by the fact, that the thirty seventh section of the same act declares, that whenever a *feri facias* shall have been returned *nulla bona*, the creditor may file a bill in chancery, for subjecting to the satisfaction of the judgment or decree, "any equitable or legal INTEREST in any estate, real, personal or mixed, *belonging* to the defendant ;" and that the thirty ninth section, in like manner, provides for the subjection of "any *chose in action*, real, personal, or mixed."

These two last sections evince, that the legislature deemed it good policy to subject to the payment of debts any interest in land, legal or equitable, in possession, or *in action*. They shew certainly, that the *interest* of the execution debtor may be made liable. Other parties may be brought before the court ; but if the "*interest*" of the debtor be unincumbered, no other person than himself will be a necessary defendant, because *his interest*, whatever it may be, can be subjected.

It seems to us that, as a chancellor has power to decree the sale of a debtor's *interest*, legal or equitable, in possession or in action, whenever a *feri facias* against him shall have been returned *nulla bona*, the legislature should not be *presumed* to have intended, that the execution itself should not be levied on the debtor's legal interest in land in the actual possession of a stranger. Such a return on a *feri facias* will authorize the chancellor to decree the sale of land to which the debtor *has a legal title*, and which *is not in his own actual possession*. The return gives the chancellor jurisdiction, for the purpose of compelling discovery, or otherwise removing doubts or difficulties which might have retarded or embarrassed the usual and legal remedy. And, according to the statute, the chancellor may, undoubtedly, interpose, and de-

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cree a sale of the legal right, even though there was no *impediment* to the enforcement of the legal remedy. It is not the fact, therefore, that the debtor is not in the possession of the land, but the fact that the execution has been returned *nulla bona*, which gives to the chancellor jurisdiction, to decree the subjection of his *legal interest* to the satisfaction of the debt ; and the statute does not say, that the interest of the adversary claimant shall be concluded by the decree, or be subjected to sale.

It is not deemed essential here to enquire, whether, in any case, the chancellor, entertaining a bill for subjecting the *legal interest* of an execution debtor to the satisfaction of the debt, should, or could, bring before him a stranger in adverse possession, under an *independent legal* title, and adjudicate on the conflicting legal rights; for his right to do so could not affect the question of legal liability to the execution. The only motive for filing a bill in such a case would be to obtain a discovery of title, or a removal of incumbrances or liens, or to compel the sale of that which the sheriff was afraid to sell under an execution. If it be right to sell under a decree, why should it be deemed wrong to do the same thing under an execution, as in both cases the *interest* of the debtor only is sold? That which is deemed good policy in the one case, should not be denounced as bad policy in the other. We admit that we consider the policy as very questionable in either case, though equally so in each. But that question belongs exclusively to another department of the government, and has, as we think, been positively settled by legislative enactment.

It is the duty of this court to *presume*, that the legislature understood its own purpose, and the import and effect of its own language ; and we should not, without conclusive proof, decide that it so far blundered as to insert, in an important and permanent statutory system, a distinct, positive and substantive provision, without design, or in such terms as to render it not only inoperative, but incongruous and illusory.

It is the duty of this court to give some effect to every legislative provision, (whatever may be thought of its expediency,) unless it be inconsistent with the tenor or

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object of the entire enactment, or with some other provision in it, or with fundamental law.

We cannot reasonably or fairly restrict the provision which has been quoted from the thirty-fifth section of the act of 1828, to *constructive* possession. There is no ground for such an interpretation; and, as already suggested, if the legislature meant only that land in either the actual or constructive possession of the debtor, might be sold under execution, its express enactment for that purpose, was not only superfluous, but unaccountably inappropriate in its terms. The legislature must have intended (if any thing was intended,) that the legal interest of a debtor should be subjected to execution, even though a stranger might be in the "*actual possession*" of the land; and consequently, in speaking of the debtor, it used, with a converse and correspondent import, the terms "*whether in actual possession or not.*" If a stranger be in adverse possession, then the execution debtor is not in the "*actual,*" or constructive, possession. And it cannot be material, who may be in the actual possession, or *how*; the debtor is not in the "*actual possession*;" and the act, declaring that his legal interest shall be liable, whether he be "*in actual possession or not,*" must apply to him, whatever may be the reason why he is not in actual possession.

Sales of land, by authority of law, are exempt from the operation of the champerty laws.

Where land is levied on as the property of a defendant, against whom the possession is held adversely, the valuation must be of the land, (not merely of the defendant's claim,) without deduction for the adverse possession.

The champerty doctrine does not apply to sales under execution. Its policy interdicts voluntary alienations of land adversely held, but not judicial or official sales, *in vivo*.

Nor can any difficulty in assessing the value of land adversely occupied, have any decisive influence. The land, and not the title, must be valued, unless the title be limited.

If the debtor have the best title in fee, and the land be sold at a sacrifice, he may escape loss by a redemption. If his title be not the best, or the land sell for a fair price, he will have no cause to complain. And it is as easy to value the land when in the adverse possession of a stranger, as when it may be in the possession of the execution debtor, but is known to be covered by a conflicting claim.

However, these considerations, whatever should be their influence on the legislative will, cannot be urged effectually or legitimately to prove that the provision in the thirty fifth section, means nothing, or shall have no operation. *Ita lex scripta est*, is enough for this court. The proviso is clear and express, and cannot be defeated by extraneous considerations of policy. The statute of 1828 has no where intimated that land adversely possessed, shall not be liable to execution against the holder of a legal interest out of possession. Had such an intention existed, it should have been expressed, and there would have been no sort of object or propriety in the language which has been employed in the thirty fifth section, and which, comprehensive and unqualified as it is, seems to be irreconcilable with any other idea than that a legal interest in land may be sold under execution, *whoever may be in the actual possession of the land*.

Without assuming legislative power, or distorting, or entirely disregarding the proviso in the thirty fifth section of the act of 1828, we cannot withhold its application to this case.

Wherefore, this court. (*Judge Nicholas dissenting*) feels bound to decide, that the legislature has authorized the sale, by execution, of a legal title of the debtor in land in the adverse possession of another person.

Wherefore, as this court does not concur with the circuit court in all the points which have been presented, the judgment must be reversed, and the cause remanded for a new trial.

JUDGE NICHOLAS, dissenting from the decision of the majority of the court, upon the main question, read the following Opinion and argument.

THE act of 1798, 1 Dig. 513, directs writs of *feri facias* to be levied on, and the money made by sale of the debtor's "lands, tenements and hereditaments, in possession, reversion or remainder." The eighth section of the same act directs the sheriff to convey the land sold under execution, to the purchaser, and declares, "his deed shall be effectual for passing to the purchaser all the estate and

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interest which the debtor had, and might lawfully part with, in the lands."

The act of February, 1828, concerning executions, contains no clause expressly subjecting lands to sale under execution, or explaining the effect of a sheriff's sale and conveyance; though the whole tenor of the act recognises that they are still so liable to be sold and conveyed. The repealing clause refers only to such previous acts as come within its purview. So that in ascertaining what estate in lands is now subject to execution, and the effect of the sheriff's deed thereon, we are still to look to the above recited clauses of the act of 1798, as constituting a portion of the subsisting statutory law on this subject, except so far as they may be repugnant to, and unavoidably conflict with, the letter or some implication necessarily deducible from the act of 1828.

In the case of *McConnell vs. Brown*, 5 Mon. 480, it was determined, that the lands of a defendant, were not liable to execution, whilst in the adverse possession of another, under the act of 1798. This determination afterwards came under the review of my brethren and my immediate predecessor, in the case of *Shepard vs. McKivir*, 4 J. J. Mar. 112; and it was unanimously held, that "the decision is not more authoritative, than its doctrine is just and reasonable. It is conformable to the letter of the statute, and seems to be perfectly consistent with its object and spirit." The general impolicy of subjecting land so situated to execution, is there descanted upon much at large, and it is there satisfactorily shewn, how unreasonable and improper it would be, in the absence of express declaration, to presume the legislature intended to subject land so situated. Nothing further, therefore, need be said by me, on that head. We are agreed that any such intention must be clearly expressed: it is never to be presumed.

The thirty fifth section of the act of 1828, points out the manner in which property levied on, may be released, by the surrender of other property, with a proviso, that such surrender shall not delay the sale, and then follows an additional proviso, in the same section, which is worded and punctuated literally as follows: "*Provided*

further, That nothing in this act contained shall authorize a Constable to make sale of land, or to authorize a surrender of land to a Constable in lieu of other property—all legal title to real estate shall be liable to sale by execution, whether in actual possession, or not.”\*

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It is thought that the latter clause of this proviso is a substantive, distinct enactment, and should be treated as if it constituted a separate section of itself. Such is not properly the province of a proviso. It is generally used for the purpose of qualifying or restraining, in some excepted particular, a previous grant or direction. Treated in this way, there is no sense to be made out of it, for there is nothing in the previous part of the act to be thus limited. But if we must sever the latter clause from the proviso altogether, and treat it as a separate, distinct, enacting sentence, the question then is, whether it necessarily requires that we should so construe it as to subject to execution lands held in adversary possession.

It will be recollected, as a general rule of construction, “that a statute which alters the common law, or the law as it stood aforetime, shall not be strained beyond the words, except in cases of public utility, where the end and design of the act appear to be larger than the words

\* The manner of *pointing* the proviso appears to have been attended to by the learned judge, and to have had some influence upon his mind, while construing the clause under consideration.—The quotation is made, and printed in the text, exactly as it stands in the only printed copy of the law extant—the Session Acts of 1827–8.—But the acts of that session, and particularly the execution law, are very inaccurately printed; and the passage quoted, as punctuated in that volume, *varies* from the *enrolled act*, in the secretary’s office; where it stands in the following form:—

“Provided further that nothing in this act contained shall authorise a Constable to make sale of land or to authorise a surrender of land to a Constable in lieu of other property. All legal title to real estate shall be liable to sale by Execution Whether in actual possession or not.”

Here, as in the roll, it will be observed, that the clause which the majority of the court have determined is a separate enactment, stands as an independent sentence—not connected with the proviso by a dash, followed by a small letter, as in the printed copy.

There are other errors in the printing of the same act, of much greater magnitude: for instance, the obscurity, or rather the nonsense, which may be observed about the middle of the twenty third section, is caused by leaving out *fifteen words*, in one place, and changing one, in another.

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themselves." That there is no public utility, or matter of general policy, to be achieved by straining the words here, so as to make them come up to the result contended for, must be taken as a concession in this argument. That the construction attempted to be put upon the words in question, is necessary to their harmonizing with other parts of the act, is not pretended. That it would be in opposition to the spirit and general character of the rest of the act, and of other laws, is susceptible of easy proof.

In maintaining the construction which was put upon the act of 1798, with regard to this subject, my brethren in the case of *Shepard vs. McIntire*, very properly laid much and earnest stress upon the favor shewn to real estate by the legislature, in exempting it from execution until all the personal estate and slaves were exhausted; and inasmuch as slaves and personalty adversarily held, were not made liable to execution, thence inferred the absence of all intention on the part of the legislature, to subject land whilst in adversary possession. This argument still applies with accumulated energy here. For there is not only all the same partiality manifested, by the act of 1828, in favor of land, and still the same failure to subject personalty, or slaves, whilst held adversely; but other, additional, and much more effective, guards are placed around land, to prevent its premature sale, or sacrifice, and such as were wholly unknown to the act of '98. Under the latter act, land was sold unconditionally and irredeemably, for whatever it would bring under the hammer; whilst under that of 1828, it must be valued, and if not sold for two thirds of its value, the purchaser acquires only a defeasible estate, liable to redemption at any time in twelve months. Besides if the title to land adversarily held, can be sold at all under execution, it cannot be denied, that the title must be first valued. Now, can it be presumed that the legislature contemplated the ridiculous farce of the sheriff's ascertaining, by the opinion of two plain farmers, the relative goodness or superiority of two land titles? For upon ascertaining that, intrinsically depends the money value which they are bound to put upon the title about



to be sold. There is no question of which, in the general, they would be less competent to judge; for there is none of more difficulty to those who are best versed in the law, even after the facts upon which its solution depends, are fully ascertained. Without their ascertainment, and which is what no appraisers can ever be expected to do, it lies not within mortal ken, to approximate, even by a guess, the true value of any title offered for sale.

But say that, from the impracticability of the thing, the right so held, is not to be valued, and it may be sold without valuation: can we suppose the legislature capable of such gross injustice, as to wantonly sacrifice such an interest, by sale under execution, when they have taken from the unfortunate debtor all power of selling it himself, and for the mere effort to do so, they forfeit his estate? I say wanton sacrifice,—for what else would it be? We find it sufficiently difficult to procure any thing like a fair price for land, when sold under execution, with all the guards that can be thrown round the purchaser, and all the encouragement that is extended to him. What honest, worthy citizen wants to buy an adverse title to land, over his neighbor's head? What citizen of that description will buy, at any price, a law suit against his neighbor? It will infallibly be found to be a vendible commodity with none but champertors, land-jobbers and speculators. I cannot consent to convict the legislature of an intention to sacrifice an unfortunate debtor's property, with the view to favor any such class of the community. The execution law of 1828 was intended as a permanent part of our code, and may endure for centuries. I cannot but feel alarmed for the consequences, if we now put upon it a construction to authorize the sacrifice of a debtor's property whilst in adversary possession. I cannot but dread its operation upon the interests of infants, of the destitute and unfriended of all classes. Disseizers, abators and intruders, by their iniquity in withholding all such from their property, many times produce the inability of paying debts, and they will thus be enabled, without competition, to consummate the injury by buying in the title for a mere trifle. One would naturally presume, that if the legislature in-

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tended to engraft so deleterious a principle upon our code, that they would do it in the plainest and least ambiguous terms. It seems to me, that sheer justice and comity require, that we should be able to find such language before we attempt to convict the legislature of any such intention. With this understanding, let us proceed to the investigation of the true import of the language used, and see whether it necessarily compels us to adopt the construction contended for.

All legal title to real estate shall be liable to sale by execution, whether in *actual possession*, or not." According to the strict grammatical construction of this sentence, it is the *legal title*, and not the *real estate*, which is made liable to execution; and consequently, it is the *title*, and not the land that is referred to, and made liable to sale, whether in *actual possession*, or not. And here I might rest the discussion, and require of those who wish to use this sentence for any purpose, to do it with this construction upon it. It is, however, so impossible to imagine what could have been meant by a legal title being in actual possession, or not, that though this is the grammatical construction, yet we must not treat it as the true meaning of the words used. If this be admitted, candor, at the same time, requires a similar concession from the other side; that the terms, *whether in actual possession, or not*, mean nothing more, literally, than, *whether in actual, or constructive, possession*, and that the full sense of those words is couched in the latter paraphrase. The distinction between actual and constructive possession of land, is well ascertained and defined, and of familiar use in legal parlance. They are most generally used in contradistinction to each other, and such a phrase, as here used, must properly be so construed, unless there be something else to control the words into a different construction. I do not understand my brethren as controverting all this. But, say they, if we construe the legislature to mean actual, or constructive, possession merely, as the one stands in contradistinction to the other, and nothing more, then the language used is of none effect, for such would have been the law though no such words had been used. Thence they deduce the right and necessity of construing the

words beyond their literal and natural import, and making them mean, 'whether in the actual possession of the defendant, or in the adversary possession of another.' In answer to this, I beg to be informed, whether this is the first instance, by many thousand, in which the legislature has been guilty of the venial offence of using unnecessary expletives, redundant words, or even inoperative clauses and sections, which are merely in affirmance of what the law would have been without them? What else than some such matter, could be expected to have been so awkwardly introduced at the tail of a proviso?

If the legislature had intended what is now contended for, would they not, most probably, have thought the introduction of so novel and important a principle into our code, worthy of a distinct, separate section? and would not their intention have been announced in much less ambiguous language? Would they not have expressly said, *though held in adversary possession*, and not left such intention to be gathered by mere implication? It seems to me they would, at least, have used the much more appropriate language, *whether in possession, or not*, omitting the word *actual*. This idea is much fortified by the language used in the thirty fourth section, in prescribing the affidavit necessary for a defendant, to make, before he could send an execution after land in another county, requiring him to state, "that the land is not in the adversary possession of another;" thus manifesting that they were well aware of what was the appropriate language, when they intended to convey that idea.

Another argument against the construction contended for, and which is based upon implication merely, is that there is no necessity for it. For we are agreed, that the thirty seventh and thirty eighth sections of the act enable the creditor to subject the right of his debtor to land in the adversary possession of another, to the payment of his debt, by bill in chancery. This strips from my associates, the whole pith of the argument of the dissentient judge in *McConnell vs. Brown*. The legislature having, in the same act, devised another, and so much more appropriate remedy to the creditor, supersedes all necessity for giving him this so inappropriate one, by impli-

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1833.

Frizzle et al.  
vs.  
Veach.

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1833.

*Frizzle et al.*  
vs.  
*Veach.*

cation merely. In the one way, the relative merits of the adversary titles will be investigated, and finally settled, and the property, when exposed to sale, thereby enabled to produce the highest possible price; whereas, the other leads to absolute and inevitable sacrifice.

But it is said, there was a rumour in the land, about the time of the passage of the act of 1828, that the clause in question, was introduced for the purpose of meeting and overruling the then recent decision of *McConnell vs. Brown*. Such rumour never reached me. I have a right to believe that it had not reached this court twelve months ago. For at the spring term 1832, in the case of *Shropshires vs. Morgan &c.* we certainly did decide, though incidentally, and without discussion, yet expressly, that land in adversary possession, could not be sold under execution. But rumor or not, I feel it my duty to look to the language of the act exclusively, in ascertaining legislative intention. I doubt whether a tenth of the members of the legislature had seen or heard of the case of *McConnell and Brown*, then not reported. If they had, and intended to overrule it, I cannot doubt but that language much more explicit and adequate would have been used.

But what, to my mind, is an unanswerable objection to the construction contended for, is, that it will virtually repeal the champerty act of 1824. It presents a facile mode by which the wholesome provisions of that act against the vending of title to land whilst in adversary possession, may be successfully evaded. It would be a most liberal stretch of judicial power, to say, that when such a thing is proved to have been done for the purpose of evasion, we will still bring the transaction within the denunciation of the act of 1824. I am not prepared to say that I will not go that length; for such is my conviction of the sound policy of that act, that I shall be ready at all times to go as far as a judge ought, in sustaining it in vigorous, or even rigorous, operation. But may it not hereafter be plausibly urged, that inasmuch as the posterior act of 1828, authorized such sale under execution, that it must, for every purpose, be considered a *pro tanto* revocation of the act of 1824, and that the mere

assent of the defendant in the execution, that his title may be so sold, with a concurrent understanding that another is to purchase, in this mode allowed by the law itself, can never be properly construed into a fraud upon the law. Be this, however, as it may, there is no doubt such arrangement must be clearly proved, and this, if the parties choose to deny it, there will, many times, be no means of doing. The result, then, in either case, must be a partial repeal of the act of 1824. It seems to me to be an abuse of all rules of construction, to suppose that the legislature meant, by this ill constructed half sentence, so awkwardly smuggled in at the tail of a proviso, to repeal any part of such a law as that of 1824.

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1833.

*Givens*  
vs.  
*Peake.*

### *Givens against Peake.*

CHANCERY.

[Mr. Semple for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR OLDHAM COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 2.

GIVENS, who owned three lots in the town of Bedford, agreed with Peake, by a mutual covenant, that they would build, by their joint labor and contributions, a brick-house, on one of the lots; and that Peake should have a title to one half of the house and of the three lots, in consideration of the building of the house, and his contributing to its completion, two hundred and fifty dollars more than a moiety of the total cost.

A judgment in an action at law, upon a covenant, will not bar a suit in chancery for the specific performance of a stipulation of the same contract, to convey land, where it is made manifest, that the failure, tho' assigned among other breaches, was not investigated, nor any damages assessed therefor, in the trial at law

After the house had been built, Peake sued Givens upon the covenant, for damages for failing to comply with his part of the contract. Various breaches, in failing to make proper contribution, were assigned, and a refusal to "let Peake have one half of the lots," was also alleged as a breach.

Peake recovered a judgment for seventy eight dollars; and then filed a bill in chancery, for a specific execution of the contract for one half of the lots.

Spring Term  
1833.

*Givens*  
vs.  
*Peake.*

Givens did not answer the bill, but pleaded the judgment in bar of any relief. Peake replied, that there was no proof, or trial, as to the covenant for one moiety of the lots; and that the judgment for damages was obtained solely for the delinquency of Givens in not making his proportion of contribution to the building of the house. A demurrer to that replication was overruled; and by the agreement of the parties entered on the record, this writ of error is prosecuted to ascertain the correctness of that decision.

An inspection of the record of the judgment, will leave no room to doubt, that no damages were assessed for a non-conveyance. An affidavit filed by Givens, on a motion for a new trial, is itself satisfactory upon that point.

Proper mode,  
in chancery, of  
setting up a bar  
by former decision,  
is by answer.

An answer to the bill, would have been the more appropriate mode of asserting the alleged bar. If, in an answer verified by oath, Givens had alleged, that Peake had recovered damages for the non-conveyance, or that the jury had considered that matter, it would have been incumbent on Peake to have satisfactorily shewn the contrary. But if no such allegation had been made in the answer, the fact that the declaration contained a breach for not conveying, would not have been regarded. But the demurrer to the replication virtually admits that damages were not assessed on that breach, and that there was, in fact, no trial upon it.

As, therefore, the record shews clearly that damages were recovered only for Givens' failure to contribute his proportion of the cost of building the house, the judgment in the action of covenant should not bar Peake of his equitable right to one half of the house and the lots. This conclusion is not inconsistent with the record of the action at law, or with any necessary deduction from it, but is sustained by the facts in that record, and fortified by the demurrer to the replication.

Wherefore, the decree of the circuit court is approved and affirmed.

Spring Term  
1833.

## Boucher vs. Williamson.

TRAVERSE

[Mr. Crittenden for Appellant: Messrs. Morehead and Brown for Appellees.]

FROM THE CIRCUIT COURT FOR BRACKEN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 3.

THIS case presents three questions.

*First.* Upon a traverse to an inquisition for a forcible entry, Boucher, who was traversee and the defendant in the warrant, pleaded that the traversor had once before proceeded against him for the same forcible entry; that his warrant had been quashed before this case was commenced in the country; that, afterwards, a writ of error, with a supersedeas, was prosecuted to this court, and was still pending. Williamson, the traversor, replied, that there was no record of any such writ of error; and an issue was thereupon concluded to the country. A jury, sworn to try that issue, found for Williamson; but the court set aside the finding. That was right; because, had the plea been good, the court, and not the jury, was the proper tribunal for trying the issue.

Plea of *nul tiel record*, should not conclude to the country—the issue is to be tried by the ct. not by a jury.

*Second.* But the plea was insufficient and inappropriate. Could it be admitted that an original suit could be abated by another suit which was not pending, when the former was instituted, or by a writ of error at any time, still, it has been decided, that matter in abatement can not be pleaded in such a proceeding as this. *Jones vs. Overton*, 4 *Bibb*, 334. Upon a traverse, no advantage can be taken of the initiatory proceedings in the country; and the issue prescribed for the trial in the circuit court is, whether or not the inquisition be true. If two cases for the same wrong be pending at the same time, an election might be directed. But neither of the suits should be *abated*. Pleas in abatement are unsuitable to the object and character of a procedure which was instituted

The only proper issue upon a traverse, is, whether the inquisition is true, or not. Dilatory pleas are not admissible. Nor can any advantage be taken of irregularities in the proceedings upon the warrant, in the country.

If two cases are pending for the same forcible entry, an election may be directed.

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1833.

Boucher

vs.

Williamson.

Whether one man, or another, was in the actual possession of land, at a particular time, is a question of fact, to be decided by a jury—to whom all the facts and circumstances, in proof, should be submitted, without instructions as to the inference they may draw from any particular fact.

for summary and preventive justice, by placing parties *in statu quo*, until their rights shall have been properly sought or settled.

*Third.* Whether Williamson, or his tenant, Allin, or Boucher, was in the actual possession of the field in contest at the time of the alleged entry, was a matter of deduction from facts somewhat vague and indeterminate. If Allin was then so possessed, the landlord could not maintain *his writ*; and if neither of them was in the actual possession, there was no forcible entry upon either of them. Allin, as the tenant of Williamson, had cultivated the field during the year which had just ended, and notified his landlord that he might take possession of it. But, a few days prior to that notification, Boucher, who had leased the field from one Lee, had hauled and thrown upon it some logs for building a cabin, which he forthwith proceeded to erect and to occupy.

The circuit court instructed the jury, that the hauling of the logs and the placing of them in the field was not evidence of an actual possession of the field by Boucher.

Whether the acts, thus stated, constituted an actual possession of the field, was a question of fact, for the jury, and not of law, for the court, to decide. The lease, the object of Boucher in hauling and depositing the house logs, and his acts of dominion over the field, *might* indicate an intention to use the field as his own, under his lease; and if such was his intention, he should be deemed to have been in the actual possession of the field, unless some other person was actually possessed, and had not been, *by his acts*, disseized. If there was any such disseizin, no subsequent act of the disseizor, whilst in possession, could have amounted to a forcible entry; and for the disseizin itself, the person actually disseized could alone maintain a warrant for restitution.

In determining whether Williamson was entitled to restitution, it was material to ascertain *who* was in the actual possession of the field when Boucher first entered, and also whether *he* was in possession when he hauled the logs. And whatever may be the proper deductions from the facts, the jury had a right to consider them all,



and thence draw their own conclusions, without any such restriction as that which was imposed by the court.

Spring Term  
1833.

Wherefore, the judgment against Boucher must be reversed, and the cause remanded for a new trial.

## Vance and Wife *against* Campbell's Heirs. CHANCERY.

[Mr. Hanson for Appellants : Mr. Haggin for Appellees.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 2.

As one object of the bill filed in this case by the appellees, was to obtain a distribution of the personal estate of their father, and a settlement of the accounts of the personal representatives, James Campbell, the executor, was a necessary party ; and consequently, as he was not made a party, the decree against the executrix, must, for that cause, be reversed.

Executor (by intermarriage) is a necessary party to a bill against the ex'r, for settlement and distribution

But it becomes our duty also to notice an error to the prejudice of the appellees.

John G. Campbell, father of the appellees, and husband of the appellant Anne, the executrix, devised to his wife his whole estate during her life or widowhood, with power, during her widowhood, to sell the land, and, in that event, one third of the proceeds of such sale, and one third of the personal estate, was to belong to her during her life ; and the whole was to go to the children after her death.

A testator devised all his estate to his wife during widowhood, with power, as long as she remained a widow, to sell the real estate, and retain one third of the proceeds, with one third of the personalty, for life : the whole to go to the children upon the termination of her estate. She made

About two years after the probate of the will, she intermarried with her co-appellant, without having sold the land, or renounced the provision made for her by the will.

no renunciation of the provision made for her by the will, within the time allowed by law, and married without having sold the estate : held that she was not entitled to dower, and that all her rights under the will were terminated by the marriage.

Spring Term  
1833.

Vance, &c.

vs.

Campbell's  
heirs.

The circuit court decreed to her, dower in the land ; and, in that, we think the court erred.

There is nothing in the will which will authorize a court to infer, that the testator intended that, if his widow should marry without having previously sold the land, she should have any thing ; and extraneous facts are not competent to prove such an intention.

It may be urged that, as the testator gave to his wife one third of his estate during her life, in the event of her selling the land during her widowhood, we may presume that he intended that, whether she should sell the land, or not, she should be entitled, for life, to the same provision. We acknowledge that we cannot perceive any reason why, if he intended that she should have nothing in the event of her marrying again without having sold the land, he devised to her one third of his estate during life, if she should, during her widowhood, sell the land. But, however incongruous such a provision may be, or however incomprehensible may be the motive and object of it, as there is no intimation in the will of an intention that, if she should marry again without having elected to sell the land and take the benefit of the contingent legacy to her during life, she should have the whole, one third, or any other part of his estate, or that she should come in under the law as if no will had been made: we cannot make a will for him ; nor can we supply that which he may have inadvertently omitted, unless the will itself had furnished sufficient data for ascertaining that something was omitted through mistake, and what that something was. The will expressly limited the estate to widowhood, and made no other or further provision, excepting for one third during life, provided the widow should, before marriage, elect to sell the land and distribute the proceeds, and we are not allowed to presume that any thing else was intended, or what else was contemplated.

The devise to the wife during her widowhood should not be construed as a *condition in restraint of marriage* ; but should be deemed only an allowable *limitation* to the estate devised. The marriage, *ipso facto*, terminated the devisee's right to any portion of the estate as derived

from the will. And, as she had not renounced the provision made for her by the will, but had elected to hold under the will, she cannot be entitled to any part of the estate by operation of law, and contrary to the provisions of the will. Having elected to hold under the will, and having so held until after the time allowed for renunciation had expired, she cannot now be permitted to assert a right against the will, or independently of it. As, therefore, she terminated her interest as devisee, by her second marriage, she can have no right now to any portion of the testator's estate which was devised.

The appellants should, of course, be charged with rent from the date of their marriage, when the wife's title ceased; and from the same time, they should be allowed a reasonable compensation (not exceeding the profits of their estate,) for supporting and educating the appellees. Nothing before that time should be allowed, because it was obviously the intention of the testator that, whilst the mother was entitled to the whole estate, the children should participate in the profits, and should be permitted to live with her without charge for maintenance.

We cannot tell whether the ultimate decree will be better for the appellants than that of which they now complain, and which must be reversed at their instance, whatever may be the consequences to them.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, for such further proceedings as shall be proper, and for such final decree as may be equitable, according to the principles of this opinion.

Spring Term  
1833.

*Vance &c.*

vs.

*Campbell's  
heirs.*

Man and wife continuing to occupy the estate, which her former husband had devised to her during widowhood, then to his children, must account for the rents, from the time of her second marriage; and may charge them for support &c. — not exceeding the income of their estate.

The whole estate being devised to the wife, during widowhood, she cannot be allowed for the support of the children while she so held the estate.

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1833.

Dana.  
1d 232  
101 334

## O'Hara vs. The Lexington and Ohio Rail Road Company.

[Mr. Monroe for Appellant : Messrs. Morehead and Brown for Appellee.]

The *Appellee* may bring up the record, and submit it as a *delay case*, before the expiration of the time allowed the appellant to file the record. But he recovers no costs, although successful.

This case was decided in the FRANKLIN COUNTY COURT, on the 15th of April, 1833—while the Court of Appeals was in session. The decision being against the defendant, O'Hara, he prayed an appeal ; which was granted, upon his entering into bond, according to law, on or before the 22nd of April ; when the bond was executed. The rule prescribed by the statute (1 Dig. 387,) allowed the *Appellant* until the third day of the next term of the Court of Appeals (10th of Oct.) to return to the clerk a copy of the record. But the *Appellee*, on the 24th of April—two days after the appeal bond was executed, produced in Court a copy of the record, and moved that the case be taken up and disposed of as one prosecuted for the purpose of delay. It was objected by the counsel for the *Appellant*, that the motion was premature, as *he* had not filed the record, and there was, consequently, no cause here pending, for this court to act upon. For the Appellees, it was contended, in reply, that it was competent for them, and in conformity to the rule, (See 1 Mon. ix.) and to the usage heretofore, to procure a copy of the record, and upon suggestions like the present, to submit the case at any time.—The Court received the record, intimating that the objection to the motion would be duly weighed, before the main question was considered. But the objection, it seems, was not sustained by a majority of the court. No costs, however, were allowed to the Appellee, upon the affirmation.

May 3.

Chief Justice ROBERTSON delivered the Opinion of the Court.

The provisions of the act incorporating the Lexington and Ohio Rail Road Co. which authorize the company to appropriate the land of individuals to the use of the road—the damages being first paid, are not unconstitutional

THIS is submitted as a delay case.—Pursuant to the fifteenth section of its charter, (*Session Acts of 1830*, p. 133,) "*the Lexington and Ohio Rail Road Company*" procured a regular inquisition and assessment of damages, for a small portion of O'Hara's land, through which it designs to construct its road. The county court approved the inquest ; and O'Hara appeals.

One objection only is made to the inquest, and that is that it is unconstitutional, and therefore void : *first*, because the act of incorporation grants exclusive privileges,

without any consideration of public service ; and *secondly*, because it will divest O'Hara of his freehold right, without sufficient authority.

Spring Term  
1883.

*O'Hara*

vs.  
*Lex. & Ohio  
Rail Road.*

Neither of these reasons can be effectually applied to this case.

*In the true sense of the constitution*, no exclusive privilege has been granted to the corporation. If the charter be, on that ground, unconstitutional, it would be difficult to maintain the validity of any statute for incorporating any bridge company, or any bank, or even for granting any ferry franchise.

Public utility was the chief object of the act of incorporation. The commonwealth had the constitutional right to construct a rail road. It had the right to delegate its power to individuals. Its right of *eminent domain*, expressly recognised and reserved by the constitution, authorized it to "*appropriate*," or to delegate the power to take O'Hara's land for public use, *by paying him a just compensation*. The charter does not allow the company to appropriate the land without *first* paying the assessed damages. And consequently, we perceive no infraction of the constitution in the fifteenth section of the charter, nor in any thing which has been done by the inquisition, or the county court, or the Rail road company.

Wherefore, the inquisition and its approval by the county court must be affirmed.

*Judge Underwood* thinks the submission is premature, because the record was not filed by the appellant, and the time for filing it by him had not expired.



are required to perform. The order substituting Robinson, in the room of Shelby, does it only so far as relates to the petition. We cannot go into the acts of the parties before the arbitrators, for the purpose of aiding a defective submission under the statute. The record should shew what the parties meant, and what authority was conferred.

Judgment reversed, with costs, and cause remanded, with directions to quash the award.

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1833.

*Betty*  
vs.  
*Moore.*

### Betty vs. Moore.

[Mr. Crittenden for Plaintiff: Mr. Chinn for Defendant.]

FROM THE CIRCUIT COURT FOR SCOTT COUNTY.

TRESPASS—  
for freedom.

14 235  
108 584

Judge NICHOLAS delivered the Opinion of the Court.

May 3.

THIS suit was brought by Betty to establish her right to freedom. She claims it under the will of Jeremiah Morton, emancipating her after the death of his wife Judith, who was dead previous to the institution of the suit, and who previous to, during and subsequent to her marriage with Morton, had Betty in possession for sixteen or eighteen years.

Case—the gift of a slave, upon condition that it should revert to the donor, if the donee died without issue.

To rebut this claim, the defendant proved that Mrs. Morton obtained Betty from her brother, Frank Moore, by purchase; the terms of which are stated by one witness thus: “so far as the title was involved, it was a conditional one, that if Mrs. Morton died without having a child, then Betty was to revert; that in the event of her having children, the title was then to be absolute, otherwise not, but to terminate at her death without issue.” Another witness stated it thus:—“that when Frank Moore first offered to his sister Judith the girl Betty, upon the condition that she was to return to him, provided Judith died without issue, she refused to take her upon such condition, but afterwards did take her upon that condition.” A third witness stated it thus:—“on

Spring Term  
1833.

Betty  
vs.  
Moore.

condition that Betty and her increase were to return to Frank Moore, provided Judith had no child to heir them." It was further proved, that Judith died without issue.

This state of case appearing on the trial, the court instructed the jury, in effect, that upon the whole proof, Betty had no right to freedom.

If property be given or sold, with a condition, that it shall revert upon a contingency, & if the reservation be valid, the statute of limitations does not commence running, in bar of the right of the reversioner, until the contingency happens.

Did the correctness of this instruction depend upon the effect of the statute of limitations exclusively, which appears to have been principally relied on in the circuit court, as it was in the argument here, we should be inclined to concur with the circuit court, and approve the finding of the jury for the defendant. For, besides the evidence being inadequate to shew an adversary holding by Morton, if the terms of the sale reserved a valid reversionary interest in the slave to Moore, after Mrs. Morton's death, his cause of action did not accrue, nor could the statute, therefore, have commenced running until her death.

There is no discrepancy in the proof as to the terms of sale. According to the testimony of each of the three witnesses, it was a transfer, by parol, of the absolute right to Betty, on condition that Judith Moore had a child, or children; and on failure of that condition, that, at Judith's death, Betty should revert to Frank Moore. This reservation of a reversionary right to the vendor, can have no further or greater efficacy than if it had been granted by the terms of sale to a third person. The determination of the case depends upon the validity of any such reservation or limitation.

If a gift, or sale, of a slave, or other chattel, be made upon condition, that if the purchaser die without issue, the chattel shall revert, or pass to a third party, the condition is void—and the entire property vests absolutely in the first donee.

At common law, a gift to a man and the heirs of his body, was an estate upon condition, that it should revert to the donor, if the donee had no heirs of his body; but if he had, it should then remain to the donee. It was, therefore, called a fee simple on condition that he had issue. 2 Black. Com. 110. The statute *de donis* afterwards turned this estate upon condition, when it was created in the conveyance of real estate, into *fee-tail*. As to personalty it still remains a fee on condition. According to the earlier decisions, whilst chattels were of little estimation, a grant of personalty for life, carried



with it the whole estate. But the law, as it has been settled in more modern times, allows the limitation of a remainder after a life estate in personalty. And it has even been allowed by executory devise, or conveyance in trust, to create what is, to some extent, in effect, the same as a conditional fee, or estate tail, in such property, without thereby passing the absolute and entire interest to the first taker. This, however, is expressly confined to those two excepted modes of creating an estate in personalty. For it is well settled, that, (with the exception of an annuity,) wherever by any of the ordinary modes of conveyance, an estate in fee conditional, or fee-tail, is granted in or out of personalty, that it passes the whole estate to the grantee or first taker, and consequently, all further limitations or reservations are null and void. See *Har. Co. Lit.* 20 a. *Fearne* 460, 463. *Roper on Legacies*, 393. *Christain's Black.* 113. So that properly speaking, there can be no such estate in personalty as a fee simple on condition of having issue, or fee-tail, but all such estates when attempted to be created, carry the whole interest absolutely.

The application of this doctrine to the case before us, requires no elucidation. Nor can any restriction of its operation be found in the act of 1798, converting slaves into real estate; for the thirty third section of that act declares, that no remainder in a slave shall be limited, otherwise than the remainder of a chattel personal, by the rules of the common law; and the act of 1796—1 *Dig.* 314, converts all estates tail in land; or slaves, into estates in fee simple.

The conclusion is, that the purchase made by Judith Moore, according to the terms thereof, as proved by the defendant, vested in her the absolute right to Betty; which passed, on the marriage, to Morton; and Betty was emancipated by his will.

The judgment must be reversed, with costs, and the cause remanded, with directions to set aside the verdict, and for further proceedings consistent herewith.

Spring Term  
1833.

Betty  
vs.  
Moore.

But — there may be a limitation of a remainder after a life estate, in personalty; or it may be created, in effect, by executory devise, or conveyance in trust, — tho' not by the ordinary modes of conveyance.

Spring Term  
1833.

DETINUE.

## Daniel vs. Daniel.

[Mr. Crittenden for Appellant : Mr. Sanders for Appellee.]

FROM THE CIRCUIT COURT FOR BOONE COUNTY.

May 4.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A second donee of a slave (or one claiming under him,) relying upon the possession of the donor for five years after the first gift, in bar of the right of the first donee, must show that the latter *had not the possession at any time within the five years*; or that the donor continued, for five years, in the uninterrupted, adverse possession.

GEORGE W. DANIEL, by his next friend, brought two actions of detinue against Vivion Daniel—one for a slave (Cresa) and one of her children, and the other for another and younger one of her children.

The two suits were consolidated; and G. W. Daniel obtained a judgment for the three slaves.

Vivion Daniel had bought the slaves at a sale of them under an execution, in his own favor, against the father of George W. Daniel, who (i. e. G. W. D.) claims them in virtue of a gift alleged to have been made to him, in the year 1814, of Cresa, by his grandfather, Peter Daniel.

After same testimony had been introduced, tending to prove a gift by Peter Daniel to George W. Daniel, shortly after his birth, and when his father was in the possession of Cresa; and after some other testimony had been heard, tending to prove a prior gift to George W. Daniel's mother, before her marriage, and when she was a minor, living with her father—the circuit court instructed the jury, that if they should believe, “that Peter Daniel gave the girl in controversy to his daughter Nancy, more than five years before the gift to her son George W. Daniel, and that during that time, Peter Daniel held said girl in his own possession, claiming her as his own, and exercising acts of ownership over her, such possession vacated the first gift.”

As the instruction does not necessarily import, either that the daughter *never* was in the possession of the slave within five years succeeding the gift; or that the donor “*remained*” in the possession, “notwithstanding such gift,” in the language of the forty first section of an act of 1798, (2 Dig. 1158-9;) or that *he continued, for five years,*

in the *uninterrupted, adverse, possession*—the facts hypothetically stated, do not result in the legal deduction that the gift never took effect, or was afterwards invalidated; and more especially in favor of one who was not a creditor or purchaser.

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*Summers.*

Wherefore, without intimating any opinion as to the effect of the testimony which was heard on the trial, this court orders and adjudges that, in consequence of the erroneousness of the foregoing instruction, the judgment of the circuit court be reversed, and the cause remanded for a new trial.

## Shrieve vs. Summers.

EJECTMENT.

[Mr. Hewitt for Appellant : Mr. Owaley for Appellee.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

May 4.

THIS is a controversy relative to the position of the true boundary line between two adjoining surveys and patents. *Southall's* is the elder grant; and Summers, the lessor of the plaintiff, who succeeded in the action of ejectment, claims under it. *Bramlett's* grant, junior in date, and under which Shrieve claims, calls to adjoin Southall.

The proof is, that Southall, by his tenants, took possession of his tract, obviously with the intention to hold to the full extent of its limits, before there was any improvement made by Bramlett, or those claiming under him, upon the land in contest.

It seems that there are two lines, the one set up by Shrieve, and the other by Summers, as the true bounda-

Two patentees entered on their respective, adjoining tracts—each intending to take possession to the extent of his limits. A dispute arose as to the position of the boundary between them: so there was a slip of land claimed by both. The entry of the elder grantee, on his land, was made before the junior grantee had made any improvement upon

on the disputed slip. The latter (or one claiming under him,) afterwards enclosed a part of the disputed slip—a small peice, *more*, and another peice, *less*, than twenty years before this suit, brought (by one claiming under the elder grant,) for the disputed slip:—held (contrary to a *dictum* in 2 J. J. M. 397-8,) that the elder grantee was disseized, and the junior grantee protected by the statute of limitations, for so much of the land *only* as he had *actually* enclosed twenty years before the suit.

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1d 239  
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ry. The land lying between them constitutes the subject of dispute.

More than twenty years before the commencement of the action, Shrieve, or those under whom he claims, enclosed about an acre and a half of the land between the two lines, claiming up to the line most unfavorable to Summers. Within less than twenty years before the commencement of the action, Shrieve extended his fences, and enclosed more of the land in dispute. Shrieve therefore contends that if he passed the true boundary between the patents, he is now protected by the operation of the statute of limitations, as to the entire strip of land claimed by him between the two lines.

The circuit court thought otherwise, and instructed the jury, in substance, "that if they believed Southall, or those claiming under him, settled upon Southall's patent, claiming to the extent of its boundary, before Bramlett, or those claiming under him, took possession of any part of the land in contest; and that Southall, or those claiming under him, have continued to occupy and claim possession of his patent boundary ever since the first settlement thereon: then any after entry upon the land within Southall's patent boundary, by those claiming under Bramlett, and improving the same, did not in law confer possession, on those claiming under Bramlett, beyond their actual close."

This instruction was resisted by Shrieve. Its direct effect was, to confine the protection which he claimed under the statute, to the acre and a half which had been enclosed more than twenty years before suit brought, in case the jury should believe that the line most favorable to Summers was the true patent line.

The jury found against Shrieve, and he has appealed.

We concur with the circuit court. By the settlement upon Southall's patent, possession was acquired to the extent of its boundary—nothing appearing to limit the possession to less than the whole. 4 *Bibb*, 101—2 *Marshall*, 448.

According to the case of *Hord vs. Bodley*, 5 *Litt. Rep.* 89, if the junior grantee be in possession of the lap, and the senior grantee afterwards enter thereon, and improve

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a part of the interference, with an intention to take possession to the extent of the patent boundary under which he claims, he is in law possessed of the whole tract ; and for the purpose of maintaining his action of ejectment against the junior patentee, may elect to be disseized. The actual occupancy by the junior patentee of that part of the land which is not within the interference with the elder grant, does not give possession of the part within the interference, although the elder patentee never actually entered upon any part of the land included in his patent. 4 *Bibb*, 257—1 *Marshall*, 208—3 *Marshall*, 128. The converse of this is true in respect to the senior patentee making an entry on the outside of the interference not then adversely held by the junior patentee, unless he intended by the entry not to take possession of the interference. 1 *Marshall*, 347—3 *Marshall*, 615.

Under the doctrine of the books cited, those claiming under Southall must be regarded as in possession of the entire tract patented to Southall, from the date of their first settlement ; and it follows, that the extension of the fences, thereafter, by those claiming under Bramlett, over the true line, upon the possession of those claiming under Southall, did not amount to a disseizen of the prior possession, beyond the quantity actually enclosed. It is like the case of junior patentee entering after the elder patentee. The possession acquired by such entry is confined to the actual close. 2 *Marshall*, 448—5 *Monroe*, 543.

It follows, that Shrieve was only protected by the statute to the extent of the acre and a half cleared and fenced for more than twenty years prior to the institution of the suit.

There is a *dictum* in *West vs. Price's Heirs*, 2 J. J. *Marshall*, 388, which seems to conflict with the foregoing cases. It is intimated in *West vs. Price's Heirs*, that the junior patentee entering into the lap, acquires a possession of his entire tract, against the elder patentee, who had previously entered outside the lap. This was intimated without any examination of the cases. It was unnecessary to the decision of the case, and is not law.

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1888.

*Rogers*  
vs.  
*Grider.*

The evidence in respect to the disputed lines, was of such a character, that the finding of the jury cannot be disturbed. We should have sustained the verdict, had they found for Shrieve.

The deed from McClure to Cravens was legitimate evidence for the purpose for which it was offered.

Judgment affirmed, with costs.

CHANCERY.

### *Rogers against Grider.*

[Messrs. Morehead and Brown for Appellant: Mr. Crittenden for Appellee.]

FROM THE CIRCUIT COURT FOR WARREN COUNTY.

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May 6.

Judge NICHOLAS delivered the Opinion of the Court.—Judge Underwood did not sit in this case.

Statement of the  
case.

ROBERT MOORE conveyed a tract of land adjoining the town of Bowlinggreen, to his son-in-law and daughter, Martin Grider and wife, which was afterwards sold, under executions against Grider, in his life time, and Rogers became the purchaser. After Grider's death, Mrs. Grider filed her bill against Rogers, claiming, first, the whole of the land; and if she was not entitled to that, then one moiety, to be allotted to her in severalty, and dower out of the other moiety. The circuit court, considering her entitled to the whole, decreed a release of the claim of Rogers to her.

This decree has been assailed in argument on two grounds. First: that Grider and wife took the title under the conveyance from Moore, as joint tenants, and, therefore, according to the terms of the act of 1796, 2 Dig. 686, the interest of Grider did not, and could not, even if there had been no previous sale of his interest under execution, accrue to his wife at his death. Second: that if Mrs. Grider is entitled to the whole, then the court had no jurisdiction, to give her relief.

The first point was otherwise ruled by this court, at the present term, in the case of *Ross vs. Garrison and wife*. [*Ante*, 35.] That case was not argued at the bar, and we had to dispose of it without the benefit of any suggestion from counsel against the view there taken. We were, therefore, glad to find it again arising in this case, and meeting a full discussion at the bar, thereby enabling us to review our decision upon a question of so much importance, before it had gone out, and with the aid of such objections as counsel could urge against it. The result of the discussion and our subsequent investigation, has been to confirm us in the impression of the correctness of our decision.

The position there assumed, that a conveyance to husband and wife, does not make them joint tenants, but that they hold by what is termed a tenancy by entireties, is fully sustained, not only by the opinion of *Coke*, 1 *Inst.* 1861, for which he cites adjudged cases before his time, and in which he is followed by all the approved text writers, but by several modern adjudications, both in England and the United States. The distinction is not merely ideal and arbitrary, but is founded in a substantial difference. One of the incidents of joint tenancy was the right of each of the joint tenants to alienate his interest, thereby sever the joint tenancy, and render his co-tenant tenant in common with the alienee. Whereas, it is agreed by all the authorities, that neither husband or wife can, by the common law, make any alienation of an estate conveyed to them during coverture, so as to affect the entire right of the other, on his or her surviving. The unity of person subsisting between man and wife, in legal contemplation, prevents their receiving separate interests in an estate conveyed to them during coverture. The estate of joint tenants is an unit, made up of divisible parts, subsisting in different natural persons; the estate of husband and wife is an unit, not made up of any divisible parts, subsisting in different natural persons, but is an indivisible whole, vested in two persons, who are actually distinct, yet who, according to legal intendment, are one and the same. On the death of husband, or wife, the survivor takes no new estate or interest; nothing

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1838.

Rogers  
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The conveyance of an estate to husband & wife, does not make them joint tenants: they have a tenancy by entireties; neither can alienate the estate, or any share of it, and upon the death of either, the whole belongs to the survivor—the statute abolishing the *jus accrescendi* not embracing this description of estate.

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that was not in him, or her, before. It is a mere change in the properties of the legal person holding, not of the estate holden, and by the loss of an adjunct, reducing the legal personage to an individualty, identical with the natural. Not so, however, with regard to joint tenants. On the death of one, a new interest, an additional estate, does accrue to the survivor, by the *jus accrescendi*.

The distinction between joint tenants, and husband and wife holding by conveyance to them during coverture, is, therefore, not merely verbal; nor can they be said to come strictly within the terms of the act of 1796. There is good reason, indeed, why they should have been omitted from its provisions. The *jus accrescendi*, as between joint tenants, was, no doubt, taken away because of their power of alienation, and thereby severing the joint tenancy. It was deemed unjust that the mere failure to alienate, or sever the joint tenancy, during a man's life, should have the effect of forfeiting his estate to his surviving co-tenant, to the exclusion of his own heirs. This reason does not apply as between husband and wife, there being with them, no such separate power of alienating, or severing the estate; and to concede such power *de novo*, would be to make a rule unequal and unfair in its operation, as the wife is under the dominion of the husband, and can alienate nothing without his assent.

We feel, therefore, no ways inclined to retract the decision in *Ross vs. Garrison and wife*; the consequence of which is, Mrs. Grider must be considered the owner of the whole estate here sued for.

But we think she has misconceived her remedy. There is no reason whatever shewn, why she should not sue at law; or why that remedy is not as perfect and complete as a bill in chancery, provided she be, as we have decided she is, entitled to the whole.

The decree must be reversed, with costs, and cause remanded, with directions to dismiss the bill and cross bill, with costs, for want of jurisdiction; but without prejudice.

The remedy for the survivor of husband & wife, to recover an estate conveyed to them during the coverture, is complete at law — chancery has no jurisdiction.



Spring Term  
1833.

## Henry vs. Underwood.

FERRY CASE.

[Mr. Richardson and Mr. Pirtle for Appellant: Mr. Triplett for Appellee.]

FROM THE JEFFERSON COUNTY COURT.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 6.

THIS appeal is prosecuted to reverse an order of the county court of Jefferson, for establishing a ferry, in the name of Peleg Underwood, on the Ohio river, opposite to New Albany, pursuant to a special act of assembly, in the following words: "That it shall be lawful for the county court of Jefferson county, a majority of all the justices being present, to hear an application of Peleg Underwood to establish a ferry across the Ohio river, from the Kentucky shore, from a point about one half mile below Shrieve's ferry, on said Underwood's land; and if a majority of the said court, then present, upon hearing the motion and *evidence* offered by any person interested, *for* or against the establishment of the ferry, shall be of opinion that a ferry ought to be established, they shall have power to establish the said ferry:—*Provided however*, that said Peleg Underwood shall advertise, at least one month, at the court house door, and in some newspaper in Louisville, the time that he will make the application; and, *provided further*, that either party may have the same right to appeal, or prosecute a writ of error, to the court of appeals, from the decision of said court, as in *similar cases*."

Grant of a ferry, under a special act of Assembly—Construction of the act.

We shall not now consider the sufficiency of the notice, nor whether notice was waived by the appearance of Henry. Had Underwood proved title to the landing, the *opinion* of the county court as to the expediency of establishing the ferry, without the evidence furnished by the depositions, which were taken without authority, could not have been reversed.

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1833.

Henry

vs.

Underwood.

By the general law, the owner of a ferry, must be the owner of the land where it is established; and no ferry is to be granted on the Ohio river, within half a mile of one previously established.—A special act, authorizing the county court of Jefferson to establish a ferry across the Ohio, “from a point about half a mile below Shrieve’s ferry, on said Underwood’s land,” allows the new ferry within half a mile of another—not dispensing with the requisition of the general law as to title; and Underwood having failed to show title in himself to the landing, the order granting the ferry is reversed.

But we are of the opinion, that it was incumbent on Underwood to prove, that he had a title to the landing on the Kentucky shore; and he exhibited no other evidence of title than a conveyance from the Bank of the United States; which was insufficient to shew that he had title, unless title in the Bank, at the date of the conveyance, had also been proved.

According to the general law, as it has been frequently expounded by this court, the owner of the landing can *alone* be the proprietor of a ferry across the Ohio river; and, according to the law regulating the establishment of ferries on that river, the ferry sought by Underwood could not be established, because it would be not more than half a mile from a ferry already established.

We cannot presume, that the legislature intended to dispense with proprietorship, by Underwood, of the land which the general law required as indispensable to the grant of a ferry to any citizen of Kentucky. Nor is there any thing in the special act of assembly, which imports such an intention. The act seems to have presupposed that he was the owner of the land. But the legislature surely did not decide, or intend to decide, that he did own the land. Doubtless, the words, “on said *Underwood’s land*,” were used to designate the place for the ferry, and were superinduced by his own representations as to his proprietorship, about which there was no investigation or dispute, as the application for the act was *ex parte*.

According to a reasonable interpretation of the special act, the legislature intended only that, as another ferry within the distance limited by law, might be required by general convenience and public policy, the county court of Jefferson should not, upon Underwood’s application, be interdicted, by the law limiting the distance within which ferries should not approximate, on the Ohio, from promoting the common interest by granting to him a ferry, if, in its opinion, such a “ferry ought to be established.”

That, as we must infer, was the only object of that act. The legislature did not intend to dispense with proof of title to the land, or of any other fact, except distance,

which the general law required to be established in ordinary applications for ferry grants on the Ohio river. Any other construction of the special act would give to it an operation not only extraordinary, but unreasonable and unjust ; for, if any other person than Underwood be the true owner of the land, it should not be appropriated to public use without his consent, or without a full equivalent first paid to him.

The act authorizes the county court to hear Underwood's application, and hear evidence ; and authorizes an appeal or writ of error for revising the order of the court. Hence, something more was expected than the exercise of an arbitrary discretion by the county court. Proof of title was indispensable.

Wherefore, as Underwood failed to establish title to the land where the proposed ferry would be established, the order granting to him a ferry was unauthorized by any law—general or special ; and is therefore set aside and annulled.

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1833.

*Walker's ex's*  
vs.  
*Ogden.*

The property of an individual cannot be taken for public use (as for a ferry,) without his consent, or an equivalent first paid.

## Walker's Executors *against* Ogden.

CHANCERY.

[Messrs. Mills and Brown for Plaintiffs : Mr. Talbot and Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 6.

By the will of John Walker, who died in 1800, his executors were authorized (according to a proper construction of the whole will,) to lease, or sell, a tract of land, of one hundred and fifty acres, on which he resided.

History of the case.

This tract he had bought from Alexander Montgomery, whose bond for a title he held ; but who had, without his (the testator's) knowledge, and during his last illness, made to him a conveyance.

Seventy three pounds of the consideration remained due to Montgomery, at the death of Walker.

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1833.

*Walker's ex's*  
*vs.*  
*Ogden.*

On the 15th of November, 1800, the executor and executrix sold the land, by executory contract, to Master-son Ogden, for the price which Walker had agreed to pay Montgomery, that is, one hundred and eighty pounds, and delivered to him the possession.

By the written contract, signed by Ogden, as well as by the vendors, it was agreed, that he should pay fifty pounds in four months, and at the time of such payment, execute his note for "fifty seven pounds, on interest, and likewise discharge the bond due to Montgomery for seventy three pounds, when he makes a good title to the said land;" that when Ogden paid the fifty pounds, and gave his note for fifty seven pounds, the vendors should make him a good title, and also assign him the bond on Montgomery; that if Ogden should pay the fifty pounds, and execute his note for the fifty seven pounds, according to the contract, and thereupon should not receive a conveyance and an assignment of the bond, he should retain the possession and use of the land until the conveyance and assignment should be made, "by paying the use of the whole money that said Walker paid to the said Montgomery:" but that if Ogden should fail to pay the fifty pounds, at the time stipulated, he should pay rent, at the rate of ten bushels of corn per acre, for the cleared land, with certain exceptions and qualifications which it is not necessary to detail.

Neither party complied with the covenant.

About the first of January, 1801, Ogden sent a message to the executor, communicating his intention not to keep the land, as a purchaser; consequently, he did not, at the expiration of four months, pay the fifty pounds, nor was a conveyance made to him. But in the summer of 1801, the parties having in the mean time ascertained that Montgomery had conveyed the title, Ogden changed his determination, and paid the fifty pounds. He paid, some time afterwards, the fifty seven pounds; but never has paid the seventy three pounds, which he covenanted to pay to Montgomery. But, not having received a conveyance from the executor and executrix, and having, several years after he took possession, purchased some adversary outstanding titles, for the pur-

pose, as he said, of securing and quieting his possession and right, he refused to pay the seventy three pounds, and attempted to disclaim the contract. Whereupon, Montgomery sued Walker's representatives; on the bond for seventy three pounds, but failed in his action. The cause of this failure does not appear in this record.

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1833.

*Walker's ex's*  
vs.  
*Ogden.*

In 1821, Ogden sued the executor and executrix, in the Bourbon circuit court, for a breach of-covenant, in failing to make the conveyance according to their undertaking; and in 1826, he obtained a judgment against them, for eight hundred thirty five dollars sixty one cents, the principal sum which had been paid by him, and six per cent. interest thereon.

To enjoin that judgment, this suit in chancery was brought. The bill and amendment pray for a decree for rents, and for a set off of rents against the judgment, and for restitution of the land.

The answers resist a decree for any relief, on the ground:—that the complainants had no title; that the defendant had purchased the title from others; that the title so purchased is the paramount right, and that consequently he should not be considered as a tenant, nor compelled to restore the possession.

The circuit court decreed, that the complainants were not entitled to rents, nor to restitution; but that they were entitled "*to the value of the improvements upon the land when Ogden got possession*"; and accordingly decreed to them a credit on the judgment for four hundred and forty three dollars, and dissolved the injunction, as to the residue, with damages.

Decree of the  
circuit court.

To reverse that decree, this writ of error is prosecuted.

Whatever may be the true measure of right between the parties, the decree has not established it, according to any allowable deduction from the facts, or known principle of equity.

Vendee of land  
(by executory  
contract) after  
remaining many  
years in possession,  
recovers a judgment  
on a breach of  
vendee, for the

The decree not only permits the defendant to enforce

the covenant for a title. The vendors then bring their bill, against the rents, profits &c. which the vendee resists, on the ground that there was a *paramount title* to the land, which *he had acquired*: held, that as the question of title was not decided (nor properly put in issue in this suit) a decree for the amount of rents and profits was erroneous.

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*Ogden.*

his judgment, without any deduction for the use of the land, but virtually decides, that he has a right to hold the land under his alleged purchase of a title adverse to that of Walker, under which he entered. By decreeing to the plaintiffs, the value of the improvements which were on the land at the date of their sale to the defendant, the court decided, in effect, that he should hold the land, in virtue of the title which he claimed to have purchased from Sprigg, since his contract with the plaintiffs; and consequently, the circuit court must have adjudged that title superior to that of Walker or Montgomery; and must also have been of opinion, that he obtained that title under such circumstances as to entitle him, in equity, to a retention of the possession, even against the right of the plaintiffs. In this the circuit court erred.

*First.* Though the defendant has exhibited Sprigg's patent, and has shewn a conveyance from Sprigg, for a valuable consideration, yet there is a technical objection to the mode of deriving and authenticating that title; and, therefore, the deed to the defendant cannot be deemed so far evidence, as to authorize a judicial decision in favor of the validity of his title, claimed to have been derived from Sprigg.

A decree settling conflicting claims to land, should not be founded on the mere legal title: the equitable title, entry, &c. should be investigated.

*Second.* Neither the entry of Sprigg, nor of Montgomery, has been exhibited; and, though Sprigg's patent is prior in date to that of Montgomery, the chancellor should not have decreed in favor of the defendant on the mere legal title, even if, otherwise, it had been proper to adjudicate on the relative superiority of the conflicting rights.

There may be cases, where the vendee of land (though a quasi tenant) may protect himself, in chancery, under a superior title acquired from a stranger, against the claims of the vendor under whom he entered.

*Third.* There is no conclusive evidence, that the defendant bought the title of Sprigg under such circumstances as would permit him, even in equity, to dispute the title of the plaintiffs. If the defendant, after he entered under the contract with the plaintiffs, had ascertained that their testator had no title, or that his title was inferior to that of Sprigg, and had, in perfect good faith and proper candor and liberality to the plaintiffs, purchased Sprigg's claim for the purpose of quieting his possession, he might, in a clear case, be entitled to the

protection of the chancellor, against the effect of any legal estoppel which would, in an ordinary case, bind him as the *quasi* tenant of his vendors. Facts may have occurred which would protect him, in equity, against any claim of restitution. What those facts should be, we shall not now stop to explain, because they have not been satisfactorily established in this case. Indeed, the parties did not seem to contemplate a full and final trial of the titles, and the case was not so prepared as to enable the court to decide on the equitable rights of the parties. The decree for improvements is, therefore, erroneous.

It becomes necessary that we should now ascertain, whether the plaintiffs in error be entitled to a decree for any relief whatever.

As it is a maxim in equitable jurisprudence, that he who asks equity, must also himself do that which is equitable, and as the chancellor should, when he rescinds a contract, reinstate the parties as far as possible, therefore it is a general rule, that a vendee in possession, and who entered under the title of his vendor, shall not be entitled to a decree for rescinding the contract, without a restitution of the possession of the land.

But the reason of that general rule does not apply to a vendor who appeals to the chancellor for restitution, merely because his vendee had renounced a specific execution, by suing at law on the contract, and obtaining a judgment for damages, for a non-execution of the covenant to convey. In such a case, the general rule is, that, as the vendee had elected his legal remedy, and as the vendor, also, has a perfect legal remedy for restitution, the chancellor should not interfere either to compel restitution, or to enjoin the judgment for damages until restitution shall be made.

If the vendee, after obtaining a judgment for damages, shall apply to the chancellor, to aid him in enforcing it, he may be required to make restitution, as a condition of obtaining the relief which he seeks. But we know of no case in which relief was ever decreed, when the vendor was complainant, and sought restitution only. Upon a bill filed by the vendor, restitution should not be decreed, unless it be incidental to some other matter,

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The general rule is, that, upon a decree rescinding a contract of sale, the possession must be restored to the vendor. — But, if the rescission be the mere effect of a recovery at law, for a breach of the obligation to convey, the vendor will be left to his legal remedy, to regain the possession. The chancellor will not interfere, unless other circumstances give the jurisdiction, and also constitute a proper case for relief.

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which gives jurisdiction to the chancellor. And even then, there may be such equitable objections to a decree for restitution, as would make it proper for the court to forbear, and remit the parties to their usual, legal, and more appropriate remedy. In this case there are some such objections. The plaintiffs have not asked for a decree rescinding the contract; nor offered to pay the amount to which the defendant may be entitled, and for which he would hold a lien on the land. Montgomery's patent does not cover more than about two thirds of the hundred and fifty acres sold to the defendant by the plaintiffs; and the residue seems to have been sold by mistake. As the possession of the defendant, for more than twenty years, should be deemed that of the plaintiffs, unless something more should appear than what this record satisfactorily establishes; should restitution be decreed, the defendant might be barred, by his own possession, from availing himself of the benefit of the title which he bought from Sprigg, as he avers, and as may be considered probable; and which title is not only older than that of Montgomery, but includes about fifty acres of the land which the plaintiffs sold, and to which they had no semblance of even a colorable claim. It may not be amiss to state also, that the plaintiffs defeated an action brought by Montgomery, long since 1800, for the seventy pounds, and we presume that they succeeded on the ground that he was unable to make a good title. Under such circumstances restitution, when it is a matter of sound and enlightened discretion, should not be decreed to the complaining vendors; as such a decree might be ruinously unjust, and they have a perfect and effectual remedy at law. Should they resort to their legal remedy and obtain a judgment for eviction, then the defendant may enjoin that judgment, and have a full, fair, and equitable end put to the whole controversy, in all its bearings and incidents.

Restitution (of land) is a matter of local jurisdiction. 'Tho' where other circumstances give jurisdiction over

But there is another and more conclusive objection to a decree for restitution, in this case. Restitution is, *per se*, a matter of local jurisdiction, and if it could be entertained by the circuit court of Bourbon, it would be so sustained only as an incident to, or consequence of,



some other matter which gave jurisdiction to that court, over the parties and their contract. But no such matter appears in this case. The rents were liquidated by the covenant. The remedy, therefore, was purely legal. There is no allegation of nonresidence, or insolvency, or other extraneous fact, which could translate jurisdiction over that covenant from a court of law to the forum of the chancellor. As the defendant was, by that agreement, to hold the land for the use of the hundred and seven pounds which he had paid, he ought not to have obtained a judgment for the interest, in his action of covenant. *That* the plaintiffs might have prevented; but neither their omission to do so, nor any error in the judgment, can vest the chancellor with jurisdiction to revise the judgment, or enjoin any part of it, and set off the interest to which the defendant was not entitled, in consequence of his having already received it in the use of the land, for which his agreement bound him to allow the use of the hundred and seven pounds, which he had paid. They filed a plea averring that, by the covenant, the plaintiff was to enjoy the land, for the use of the one hundred and seven pounds, and claiming a deduction for the interest on that sum. But, as it was improperly a plea in bar to the action, the court properly sustained a demurrer to it. They have thus shewn, that our construction was their own understanding of the contract.

We are, therefore, of the opinion that the circuit court had no jurisdiction to render any decree in favor of the plaintiffs.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with instructions to dissolve the injunction, and dismiss the bill, without prejudice.

JUDGE UNDERWOOD, dissenting from the reasoning and decision of the majority of the court, in this case, read the following Opinion.

PARKS &c. as executors of Walker, sold the land upon which their testator lived and died, by executory contract, in 1800, to Ogden. The title was supposed, by

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*Walker's ex's*  
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the parties and their contract; and the restitution is a mere incident, it may be decreed in another county.

If a party has a good defence at law, (to the whole or part of the demand) & fails to present it in due form, or it is disallowed by the verdict, chancery cannot relieve him.

A plea, in bar of the action, which sets up a defence to a part only, (as the interest,) is bad on demurrer.

*Judge Underwood's Dissent.*

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the parties, to be in Montgomery, who had contracted with Walker ; they, therefore, in substance, stipulated, that if the executors cannot make a title in fee simple when Ogden pays fifty pounds, and gives his note for fifty seven pounds, (which acts were to be performed in four months,) he is to continue in possession of the land, and have the emoluments by paying interest on the money which Walker had actually paid Montgomery for the land. Ogden was thus to have the use of the land, and pay interest as above on one hundred and seven pounds, until the executors might think proper, thereafter, to assign him a bond on Montgomery for the title, and also to transfer a lease to Ogden, which they held, and which Montgomery probably gave their testator, before the land was sold to him. This stipulation to pay interest, would seem to give ground for the inference, that Ogden was not to pay the fifty pounds, and give his note for the fifty seven pounds, if he could not get a title ; and the statement that he was to pay interest *until* the title bond and lease were transferred to him, indicates that the interest was to cease at that time, and he was then to pay the fifty pounds, and give his note for the fifty seven pounds, and look to Montgomery for the title. This view of the contract is fortified by another stipulation, which it contains, binding Ogden to pay a balance of seventy three pounds due Montgomery, when he should make the title. If Ogden did not, in four months, tender a compliance with the contract, as purchaser, then he was to hold the land as a renter, and pay so much corn per acre. The above is my understanding of the intention of the parties, to be collected from one of the most awkwardly drawn written instruments that I have seen.

Under the foregoing contract, Ogden entered ; upon the contract he paid one hundred and seven pounds ; and upon the contract, he recovered it back with interest, in an action at law, because the executors had neither made him a title for the land, nor assigned him the bond on Montgomery, nor the lease. To enjoin this judgment, the executors filed their bill, in Bourbon, where the judgment was rendered, although the land is situated in

Shelby; and they pray that Ogden may be compelled to restore to them the possession, and to allow a credit against the judgment, for the value of the use and occupation while Ogden held the land.

The first question made in behalf of Ogden, is, that the chancellor had no jurisdiction to enjoin the judgment at law, for the purpose of setting off rents against it, in such a case. I think otherwise. Ogden has chosen to put an end to the contract by obtaining a judgment for his purchase money and interest. If he had proceeded in chancery, for a specific execution, and had there rescinded the contract, what would the chancellor have done? He would have placed the parties in *statu quo*, as far as he had power; and in so doing, he would have required Ogden to restore the land, and account for rents and waste, receiving a credit for lasting and valuable improvements.—*Griffith vs. Depeu &c.* 3 Mar. 177. *Ewing's heirs vs. Handley's ex'ors.* 4 Lit. Rep. 371. The rents of the land during Ogden's occupancy, constitute an equitable set off against the interest of the money which Ogden has recovered. The land and its profits were the consideration on one side; the money and its interest the consideration on the other. There was such a connection, therefore, between the demands, as authorized the chancellor to take jurisdiction, for the purpose of making the set off. This is the necessary result of the principles settled in the cases of *Tribble vs. Taul*, 7 Mon. 455, and *Burnham vs. Oldham &c.* *Ibid.* 653. A court of law would be altogether inadequate to afford redress, and do complete justice between the parties. At law the vendee is entitled to his money and interest, for a breach of the vendors covenant; and I know of no case where the vendor has been permitted to set off the unliquidated rents, at law. If he were to attempt it, the vendee would have a right to counteract the defence, by his claim for improvements; and thus these unliquidated demands would be brought into litigation before the common law judge, contrary to all precedent. But if the common law courts could afford redress, as it is clear, under the cases cited, that the chancellor may also give it, it would only follow, that the jurisdiction was concurrent; and as

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the executors did not defend at law, so as to obtain the set off, they may now go into chancery for that purpose. 2 *Bibb*, 5, and 200. 5 *Mon.* 394.

As Walker's executors had a clear right to go into chancery, to obtain an allowance for rent; and I think, likewise, to suspend the collection of the judgment at law until Ogden did justice by surrendering the entire consideration he had received; for surely it cannot be pretended, that he is to get his money and its interest back, and keep the land and its profits besides, thereby leaving the estate of Walker, to sustain an entire loss of the sum paid to Montgomery—the next question is, to what court should they make application? *Strother &c. vs. Cardwell's administrators*, 2 *J. J. Mar.* 354, furnishes a complete and satisfactory answer. In that case, the land about which the litigation arose, was situated in Gallatin county; the judgment was obtained in Shelby county, and the circuit court of Shelby granted the injunction. The case of *Mason vs. Chambers*, 4 *J. J. Mar.* 409, is also in point, upon this subject. These cases prove that the court in the county where the judgment is rendered, is the only proper court to decide the merits of a bill enjoining the judgment; and that in disposing of the case finally, the court in which the judgment has been rendered, may settle and adjust all matters between the parties, incidental to, and connected with, the judgment enjoined, without regard to their locality. In *Mason vs. Chambers*, a judgment of another circuit was perpetually enjoined, because of its connection, as an incident, with the main subject of controversy.

It is, therefore, my opinion that the Bourbon circuit court ought to proceed, and settle the entire controversy between these parties, by taking an account of rents, improvements and waste, and upon a settlement of the accounts, Ogden should be compelled to surrender the possession of the land to the executors.

I deem it useless to cite cases to prove, that Ogden cannot be permitted to set up a title acquired from Sprigg, unless he had shewn more than the present record exhibits. The rule cannot operate more severely upon him, than it was made to operate upon *Brook's heirs*, at the suit

of *Beal*, (manuscript decision.) If he suffers, it is in consequence of his own wrong. It would be iniquitous to permit him to hold the land, and thereby throw a loss upon Walker's estate equal to the amount paid to Montgomery: to wit, one hundred and seven pounds, which Walker's executors may have no means to recover, unless they can obtain the land. They are without indemnity, therefore, unless they can be placed in *statu quo*.

But my brethren say they may resort to their action of ejectment, and recover possession. Ogden may then enjoin, and then the chancellor may put an "equitable end to the whole controversy." The opinion intimates that there may be circumstances which would justify Ogden in purchasing Sprigg's paramount title, and setting it up for himself. If there be any such circumstances, then I am of opinion, that his possession, after the acquisition of Sprigg's title, was adverse to the claim of Walker's executors, and that he would have a right to rely on his title and possession, in bar of the action of ejectment. I cannot understand the propriety of the doctrine which justifies a man in making a purchase of the better title and then, when he wants to use it for his protection, refuses to let him to do so, unless he resorts to chancery. There is no necessity for taking such a circuitous course, unless it be in the hope that it may lead to the finding of that justice, in behalf of Walker's executors, which is now denied to them. If Ogden should defeat their recovery at law, then they will have lost their land, lost the money paid to Montgomery, and be compelled to pay Ogden the amount of his judgment!

My brethren will not allow Walker's executors to appeal to the chancellor, for the purpose of setting off rents against the interest of the money recovered by Ogden, because, they say, "the rents were liquidated by the covenant, and there can be no doubt that an action at law upon that express agreement, could be maintained, for recovering the amount so stipulated by the parties." I have a very different opinion. As I understand the contract, if Ogden paid the money (fifty pounds) and gave his note for fifty seven pounds, within four months, and got a title, then the contract would have been executed,

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and he would not be bound to pay interest to Walker's executors; but if he could not get a title, on tendering performance on his part, in proper time, then he was not bound to pay his money, but might remain in possession of the land, by paying interest, until the title bond of Montgomery, and the lease were made over to him, at a future day. Now, Ogden chose to pay the money, although he did not get a title. Having done so, I cannot perceive the least propriety in giving that construction to the contract which will bind him to pay interest on money in the hands of the executors. If the money had remained in Ogden's hands, there would have been some reason for it; but when he pays the money over, there is no longer any reason for it, and if it be tolerated, it will be the first case I have ever known, where one man is made to pay interest for money in another pocket, and exclusively subject to the use and control of the latter. So far from finding in the contract, any thing to sanction so strange a result, I think the transaction between the parties, after Ogden paid the money, should be looked upon as the common case where a purchase of land is made, and the purchase money is, in part or whole, paid over to the vendor.

When the parties shall reinvestigate these matters, in the suit in chancery instituted by Ogden, if he should be evicted, I perceive great difficulty in allowing Walker's executors again to bring forward their claim for rents, which they have unsuccessfully asserted in this suit. Will they not be barred? Or have they any such claim under the opinion delivered? Will they not, under that opinion, be driven to their action at law, on the old covenant, to get from Ogden interest on money which they had the use of?

But the reversal of the decree, and dismissal of the bill is, to me, contrary to usage. Ogden does not complain, nor does he ask a reversal. Under such circumstances, the practice heretofore has been, to affirm the case, if the appellant, or plaintiffs in error, have failed to shew that they have been prejudiced. If the proceedings in this case, as they relate to the question of restoration, are *coram non judice*; if they be void in that aspect,

because that is a local matter, then Walker's executors might proceed with their action of ejectment, without any reversal. I shall not enquire whether the proceedings, under the view taken of them in the opinion; should be considered as void, or voidable. I perceive that the parties are just at the threshold of the controversy, and unless they should be induced to compromise, and settle it upon equitable terms, they have a protracted litigation before them, and an uncertain result.

My regret is, that this court has opened the door for future strife, instead of remanding the cause, and having it ended upon the principles which I have laid down.

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### Brown vs. Givens.

FERRY CASE.

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[Messrs. Wickliffe and Wooley and Mr. Crittenden for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE LIVINGSTON COUNTY COURT.

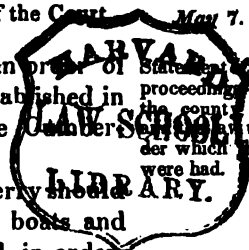
Chief Justice ROBERTSON delivered the Opinion of the Court. May 7.

THIS writ of error is prosecuted to reverse an order of the county court, discontinuing a ferry, established in favor of Gustavus A. Brown, in 1811, on the Cumberland River, near its mouth.

Brown was notified to shew cause why his ferry should "not be discontinued, for want of proper boats and hands, and for not keeping the same up and in order according to law."

After he had appeared, and testimony had been heard, the court made an order, declaring his ferry discontinued, "because the same has not been kept up, according to law, for more than two years before the commencement of this motion, with proper boats and hands."

The authority of the county court, and the propriety of its order, must be tested by the ninth and tenth sec-



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*Brown*  
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The act authorizing co. courts to discontinue ferries, must be strictly pursued.

The notice, or summons, (or order authorizing it,) to the owner of a ferry, to show cause against its being discontinued, must apprise him of the nature of the complaint.

Two causes only will authorize an order discontinuing a ferry — 1, failure, for six months after it is granted, to provide boats and hands; 2, its being disused and unfrequented for two years.

tions of an act of 1796, (1 Dig. 590,) which are as follows :—

Sec. 9. "And all ferries which may be hereafter established, and which shall not be furnished with necessary boats and ferrymen *within the space of six months after the establishment thereof*, or shall, at any time thereafter, be *wholly disused and unfrequented* for the space of two years, shall be and the same are hereby discontinued."

Sec. 10. "And it shall be lawful for the court of the county in which such ferry or ferries shall be, on complaint to them made, to summon the proprietor or proprietors of the same, to shew cause why it shall not be discontinued, and to be decided according to the testimony adduced."

As the jurisdiction thus conferred is special, and highly important, and may be liable to much abuse, the law should be strictly pursued; and unless it be so pursued, a grantee of a ferry cannot be disfranchised, under color of a proceeding so anomalous as that prescribed by the act of 1796.

It seems to this court, that the order in this case, cannot be sustained by a proper interpretation and application of the foregoing sections.

Neither the notice, nor the initiatory, or final, order of the county court, furnishes proof of its jurisdiction.

The notice required by the tenth section, must be considered in the nature of an information, and should, therefore, contain a distinct and intelligible specification of one of the only two causes for discontinuance mentioned by the ninth section. These causes are:—1st. a failure, for six months after the establishment of the ferry, to provide "the necessary boats and ferrymen;" 2nd. the fact that the ferry shall have been, for two years, "*wholly disused and unfrequented*." As the summons issued in this case, does not specify either of those causes, or any other legal cause for discontinuance, it cannot be deemed such an one as is contemplated and required, and must, therefore, be treated as no notification whatever to Brown.

His appearance did not legalize the summons, or waive any objection to its insufficiency. The sole object of re-



quiring a summons, is, that the party to be proceeded against, may be notified of the ground of complaint, so as to defend himself against it; and so, also, as to shew that the court has jurisdiction.

We will not say that, if the order directing the summons, had contained a sufficient specification of a legal charge, a general notice to appear might not have been good. But the order contained no such specification.

There is nothing in the record which notified Brown of a specific legal cause of complaint, or which gave to the county court authority to adjudicate. Even the final order of discontinuance, discloses, as the only reason for making it, an insufficient fact—to wit, that Brown had not, for two years, “kept up his ferry according to law, with sufficient boats and hands.” This may be admitted, and still it is not even implied as a consequence, that his ferry had been, for two years, “wholly discontinued and unfrequented;” or that he had failed, for six months *succeeding his grant*, “to furnish the necessary boats and ferrymen.”

Wherefore, the order discontinuing the ferry is set aside and annulled.

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McCaully  
vs.  
Givens.

The appearance of the owner of a ferry, summoned to show cause against its discontinuance, does not waive the necessity, of due notice to him, of the grounds of the motion.

## McCaully against Givens.

CHANCERY.

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105 236

[Mr. Crittenden for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE CIRCUIT COURT FOR LIVINGSTON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

THE only question for consideration in this case, is, whether the circuit court erred in dissolving an injunction restraining the appellee from disturbing the appellant, “in the possession and use of two ferries, and of the tolls” incident thereto.

The bill alleges that, in a suit in chancery, pending in the same court, between Brown and Givens (the appel-

May 7.

Case—of a bill, with injunction to restrain a multiplicity of warrants, for the tolls received by the tenant of a ferry,—the subject of a suit in chancery, and leased under an order of court.

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1833.

*McCauley*  
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*Givens.*

lee,) in which the ferry rights were involved" the chancellor had made an order, directing the sheriff to lease "Brown's Ferrys," at or near the mouth of Cumberland, from term to term, (until further order,) to the highest bidder, and to take a bond, with security, from the renter, to keep the same up, according to law, and to retain the said ferries and boats to answer any further order; and also, to take bond and security of the renter for the rent, payable to the sheriff;" that the ferries were accordingly rented to the appellant, as the highest bidder therefor, until the next June term of the court; who executed the bond, as required by the order, and thereupon took possession of the ferries, and had kept them according to law;—but that an agent, employed by Givens for that purpose, having taken a memorandum of between fifty and one hundred tolls, which had been paid to the appellant, whilst thus in the use of the ferries, Givens had proceeded, by seven warrants, for the purpose of enforcing a penalty of five pounds, in each case, against the appellant, for exacting toll without legal authority, and would, unless enjoined, continue to harrass him with the like warrants, for all the other tolls.

A court of chancery having ordered a ferry to be leased—the tenant remaining in possession after his lease expired—the order still in force, is entitled to the tolls.

The answer admits the pendency of the suit in chancery, the order therein, and the renting by the appellant, as alleged in the bill; but it insists that, after the date of the lease, the ferries had been discontinued by order of the county court; that the lease expired at the June term of the circuit court, and that the tolls, for exacting which the warrants had been issued, had been received after the June term. It does not appear to us judicially, that the order for renting out the ferry, was ever rescinded.

The fragment of a record of the proceedings in the county court, which is exhibited for the purpose of shewing that the ferries had been discontinued, shews that the county court had attempted to discontinue only one of them; and, even that far, it does not appear to be entitled to any effect, because it does not exhibit a case within the jurisdiction of the county court.

The fact that the ferries had been rented only to the June term, is not material. The circuit court had made no further order; there had been no other renting, and

consequently, according to the tenor and effect of the original order, and of the bond, the appellant was bound to keep up the ferries until otherwise ordered by the chancellor, and had, therefore, a right to the tolls after, as well as before, the June term.

The record of the suit in chancery between Brown and Givens, is not exhibited. But, as the appellee does not question the authority of the chancellor in that case, and as a state of case may be readily supposed which would have authorized the appointment of a receiver, this court will not presume that the order for renting the ferries was extrajudicial, but must deem it regular and valid.

As, then, it would seem, that the appellee had no cause of suit against the appellant for the penalty denounced for exacting toll without lawful authority, the only remaining matter for consideration, is, the power to enjoin his vexatious proceedings, by suits or other means, for disturbing or annoying the appellant, in the use of what appears to this court a clear, legal right, assured to him, by a judicial order, made in a suit in which the appellee was a party.

As each suit that was brought, and each that might be brought, must apply to a separate and distinct cause of action, the equitable right to prevent, by injunction, a multiplicity of suits, cannot be looked to as a source of jurisdiction in this case; and, as the common law tribunals have exclusive cognisance of such suits for penalties, and must be presumed competent to decide on the law and the rights of the parties, and thus to do justice between them, no apprehension of irreparable injury, in consequence of an unjust decision, could confer jurisdiction to enjoin proceedings at law.

It may be conceded, also, that, had both parties in this case been strangers to the suit in chancery between Brown and Givens, the injunction would have been unauthorized by any rule or principle of equity. But the chancellor, having gotten possession of the controversy between Brown and Givens, had a right to prevent either of them from litigating, by a new suit before a magistrate, any question involved in the suit in chancery between them;

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*McCaully*  
vs.  
*Givens.*

An order of a court, appointing a receiver, to keep up and let out a ferry, will be presumed here—nothing appearing to the contrary—to be regular and valid.

A chancellor having made an order, in a suit between parties contending for a ferry, appointing a curator, & directing him to lease the ferry: it is competent for the court, to protect the lessee, and restrain any party to the suit from annoying him with actions involving any question embraced by the chancery suit.—And this may be done, by a new bill, with injunction; but more appropriately, by order in the former suit.

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*Givens.*

and having, by his order, rented the ferries to the appellant, he must have power to protect him, (against *either of them*,) in the unmolested enjoyment of the ferry privileges, so long as he shall keep the ferries, under the order, and with the approbation or sanction of the court. Without such a power the object of the suit between Brown and Givens, might be defeated, or in a great degree, frustrated; and the order for renting out the ferries would be a mere *brutum fulmen*. We have not deemed it necessary to ransack books of reported cases, to find authorities directly in point, because reason and analogy seem to supersede the necessity of any other species of authority than that which they themselves furnish. The reason seems to us too plain to require illustration; and some analogies may be seen in 1 *Mad. Ch.* 106-112 and *Baker vs. Hart*, 1 *Vez.* 29.

Now the chief matter of controversy between Brown and Givens, is (as we infer,) whether Brown, or Givens, be the true owner of the ferries; or whether they both be owners of separate ferry franchises; or whether Givens be the grantee of a ferry in trust for Brown. These same questions might be incidentally involved in the proceedings for penalties; and one of them (the trust,) is a question which a magistrate is incompetent to decide effectually, or directly. And if the appellee be permitted to go on with his suits at law, not only may the power of the chancellor be evaded, and an unjust and unconscientious use be made of the common law forum, but the appellant may be annoyed and persecuted for doing what the chancellor authorized him to do, and by a party to the suit in which the authority was given, and, perhaps, for whose benefit, and at whose instance, the ferries were rented to the appellant. Unless the ferries had been authoritatively discontinued, or the authority of the appellant had expired in some other mode, any attempt of the appellee, to disturb his enjoyment of the ferry privileges, or to question his right, by vexatious suits for penalties, should be deemed a contempt of the authority of the chancellor, and a defiance of his power. And we are of opinion, that the circuit court had power to enjoin the appellee from pro-

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McCausky  
vs.  
Givens.

ceeding by such suits, or in any other way, to the disturbance of the appellant's ferry rights, as intended to be secured by the order under which he rented. And that there is nothing in the answer, or in the whole record, which justified the dissolution of the injunction which had been granted. It was not necessary to wait until trials at law had been had. The appellant had a right to look to the court (under whose authority he acted,) for protection against annoyance, even by the prosecution of a suit which would call in question the right which he had derived from the court.

The injunction may not be the most appropriate mode of obtaining the object ; but the *end* being within the power of the chancellor, we do not consider the *means* essential, provided it will secure the end.

The chancellor had a right to act on the person of Givens, because he was a party to the suit in which the order, which he was virtually frustrating, had been made. The injunction operates *in personam* only ; and may be considered a supplement to the suit in chancery between Brown and Givens. But whether it may be so considered or not, it is a collateral and incidental proceeding in the same court, and growing out of that suit. We are, therefore, disposed to uphold it.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded.

If, on the return of the case, it shall appear, (as has been suggested by counsel to be the fact,) that the order for renting the ferry was rescinded before the renting by the sheriff, then, of course, the injunction may be discharged.

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EJECTMENT.

*Moss et al. vs. Currie et al.*

[Mr. Talbot and Mr. Monroe for Plaintiffs : Messrs. Marshall and Julian for Defendants.]

FROM THE CIRCUIT COURT FOR BOONE COUNTY.

May 8. Chief Justice ROBERTSON delivered the Opinion of the Court.

Conflicting titles to land: the titles and possession of the parties.

THIS is an action of ejectment. The lessor read two patents, each covering the land in controversy—one to Young and Tibbs, issued in 1785; the other to Harvey, issued in 1787.

The defendants in the action (plaintiffs here,) claimed under a patent younger than either of the former; had enclosed a part of the interference, between their grant and those of Harvey and of Young and Tibbs, more than twenty years prior to the institution of this suit, and retained the ground thus enclosed, without interruption, up to the trial.

But a prior possession of all the land embraced in Harvey's patent, had been taken by tenants under Harvey's vendee, who held and claimed to the whole extent of the patent, though none of them had ever made an actual entry within the interference. But the possession so taken, under Harvey's patent, before the entry made under the junior grant, had also been continued to the trial, except so far as it had been disturbed by the entry within the lap, by those claiming under the junior title.

Upon these facts, the circuit court instructed the jury, that the statute of limitations protected the plaintiffs in error, only to the extent of the boundary which had been actually enclosed for twenty years; and verdict and judgment were rendered accordingly.

Where a patent purports a grant of land to a man who was dead at its date, the title vests in his heirs, by force of the statute; and, if

As Tibbs had died before the date of the patent to himself and Young, no title vested in his heirs until 1792, when an act of assembly operated so as to vest the legal title in them; and consequently, as their title was derived from the act of assembly, which operated only as a grant to them, of the date of the act, Harvey's title

must be deemed senior to their's. And thus Harvey and Young might, perhaps, be considered as tenants in common.

But, nevertheless, as the possession of one tenant in common should be deemed the possession also of his cotenant, nothing to the contrary appearing, the occupancy under Harvey's patent must be considered as inuring to the benefit equally of Young, and consequently was, when taken, co-extensive with their common boundary. But if Harvey entered, not as tenant in common, but adversely to Young, then he was, by construction, in the actual adversary possession to the extent of his boundary, and could not have been evicted by an entry, under a junior patent, beyond the actual enclosure; and his twenty years adverse possession would entitle him to recover even against Young.

The only question for consideration, therefore, is whether the principle assumed in the instruction given by the court, is true.

As the entry under the senior grants, was made with the intention of taking possession of the entire boundary, and was made before there had been any adversary entry under the junior patent, the holders of the elder title must be deemed to have been in actual possession to the extent of their boundary.

The subsequent entry, within the lap and under the junior patent, did not operate as a disseizin beyond the actual enclosure made by the person so entering, or by some person who succeeded him; because, as the entry under the junior patent would extend the actual possession beyond the enclosure by construction of law only; and as by the same constructive operation, the prior possession under the elder title was co-extensive with the boundary of that title, the constructive possession, accompanying or resulting from the subsequent entry under the inferior right, cannot defeat, or affect, the pre-existing constructive possession under the superior right.

An entry under a junior grant can give actual possession to the extent of the title, when, and only when, "the possession is vacant." *Fox vs. Hinton*, 4 *Bibb*, 560. And if, at the time of the entry, the elder patentee be in

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*Moss et al*  
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*Currie et al.*

the patent issued before the date of the act, (1792,) their title did not commence till then.

The possession of one tenant in common is deemed the possession of all—nothing appearing to the contrary.

When a grantee enters upon his land, his possession, by construction of law, extends to the boundaries of his grant; and if a junior grantee enters on the land, the elder will be ousted of so much as the junior actually encloses, and no more; for, tho' an actual entry will, a constructive entry will not, oust a tenant whose possession is merely constructive.

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Haley.

actual possession, even by construction, that possession will not be divested by a mere constructive entry or possession by an adversary claimant; but the prior possession will continue, except so far as it shall have been actually ousted.

An entry by a junior patentee upon the actual possession of a senior patentee, cannot be *construed* as an ouster, farther than there shall be a disseizin in fact. Two persons, claiming adversely to each other, cannot, at the same time, be in the constructive possession of the same land. Therefore, so far as the plaintiffs in error claimed to be in possession of the unenclosed land, within the lap, by *construction only*, the prior constructive possession of the elder patentees would be sufficient to shew that the actual possession remained in them. A *pedis possessio* will not be ousted by a constructive entry; nor will a constructive possession by the true owner, be ousted by any entry, or occupancy, short of that which is actual; nor beyond the boundary of the actual occupancy of the junior claimant.

Wherefore, the judgment of the circuit court appears to be right, and must be affirmed.

COVENANT.

## Thome vs. Haley.

[Mr. Marshall for Plaintiff: Messrs. Morehead and Brown and Mr. Beatty for Defendant.]

FROM THE CIRCUIT COURT FOR BRACKEN COUNTY.

May 8.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Where several breaches are assigned, if erroneous instructions applicable to either, are given, it is ground for reversal.

THIS is a suit against a sheriff by an execution creditor. Though two breaches are assigned—(that is, first, that the execution was not returned, and second, that the female slave levied on was not sold,)—nevertheless, if the court erred in its opinion upon either point, the judgment against the sheriff is erroneous.



There was proof tending to shew, that the slave was not the property of the defendant in the execution, and the jury had a right to decide whether she was his property, or was subject to sale under the execution against him. If she was not his property, or was not liable to sale under the execution, it was not the duty of the sheriff to sell her, and he should not be responsible for not selling her. And, therefore, the court erred in instructing the jury, *peremptorily*, that, if *the slave was worth as much as the amount of the execution*, they should find against the sheriff that amount.

The court also erred in permitting Moor's deposition to be read, notwithstanding the reading of it was opposed. No notice for taking it appears in the record. And it does not appear that there was any cross examination or waiver of notice.

Wherefore, the judgment against the sheriff is erroneous, and must be reversed, and the cause remanded for a new trial.

Spring Term  
1833.

*Wash et al.*  
vs.  
*Medley.*

Whether property alleged to belong to a defendant in an execution, was liable to a levy or not, is a question for the jury, and an instruction that assumes the liability, is erroneous.

A deposition being admitted, when objected to, no notice or cross examination appearing in the record, is error.

## *Wash et al. vs. Medley.*

REPLEVIN.

[Mr. Richardson for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May . 8

THE deed operated as a delivery of the slaves and personality; and as the parties lived together in the same family, the fact that no visible alteration in the actual possession accompanied and followed the deed, cannot be deemed, *per se*, fraudulent. It was a fact proper for the consideration of the jury. And whatever might be the proper deduction from the fact that every article of

That there was no visible alteration of the actual possession of slaves & personality, transferred, by deed, from one to another in the same family, is not, *per se*, evidence of fraud:

but a fact which may be submitted to the jury, whose province it is to decide the question, upon all the proof.

Spring Term  
1833.

*Griffith et al.*  
vs.  
*The Com'lh.*

a large estate, even down to ten pieces of bacon, was included in the deed, the jury, and not the court, should have decided upon the fact together with all the other facts. Consequently, we are of the opinion, that the circuit court erred, in instructing the jury that "if they believed the evidence, the deed was fraudulent against the creditors, Triplett and his assignee."

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded.

DEBT.

*Griffith et al. vs. The Commonwealth,*  
for Cooper.

[Mr. Hord for Plaintiffs : no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

May 8.

Judge UNDERWOOD delivered the Opinion of the Court.

Action ; plea ;  
special verdict,  
and judgment  
for plaintiff.

DEBT, upon administrator's bond, suggesting a *devastavit* : issue upon a plea of covenants performed : special verdict to the following effect : "that the intestate was possessed, at his death, of one bed and furniture, of the value of fifteen dollars ; two bureaus, of the value of twelve dollars ; two tables, of the value of three dollars each ; six chairs, of the value of three dollars, and one stand, of the value of one dollar ; which property was taken, at the death of the intestate, and carried to the house of Cornwell, by his direction, where it remained ; and Griffith, the administrator, while the execution of Cooper was in the hands of the sheriff, was notified by the attorney of Cooper, that said property was there, and was required to deliver the property up in satisfaction of said execution ; which he did not, and he has never gotten the possession of the property to this time, &c." Judgment for thirty seven dollars, in behalf of the Commonwealth, for the relator, subject to a small credit.

The record exhibits the following errors :—

*First.* The declaration is defective. It avers, that “*estate of the intestate, to a large amount, came to the hands, possession, or knowledge, of the administrator, sufficient to pay, &c.*” It should have averred, that *goods and chattels sufficient to pay the debt had come to the hands of the administrator to be administered.* An administrator may have *knowledge* of goods and chattels of his intestate amply sufficient to pay the debt ; yet if he cannot reduce them to possession, he is not liable, merely because he had *knowledge* of their existence.

*Second.* The plea marked No. 2, was good, if the declaration had been so. It was a valid plea of *plene administravit.* The statute allowed it to be filed. See act of 1811, (1 Dig. 534.) If true, it would exonerate the administrator and his surety from all liability in this action, unless it might be for costs to be adjudged against the administrator alone, according to the said statute.

*Third.* The plea of *nil debet* was properly adjudged bad on demurrer. *Brents &c. vs. Sihal*, 3 Bibb, 484. The plea of covenants performed would not have been good, on demurrer. *Commonwealth vs. Gover*, 4 Lit. 280. *Commonwealth vs. Miller &c.* 5 Mon. 211.

*Fourth.* The special verdict did not warrant the judgment. The goods never came to the hands of the administrator. It satisfactorily appears, from the record, that the intestate left a wife, the daughter of Conwell. By an act of 1815, a bed and its furniture were exempt from execution. (1 Dig. 498.) By an act approved, Nov. 22, 1821, every species of property, at that time exempt by law from execution, was exempted from sale by administrators, and such property so exempted was declared not to be assets in their hands. It was reserved for the use of the widow and heirs. The record leaves no doubt that the bed and furniture mentioned in the special verdict, was within the operation of these acts of assembly.

Wherefore, the judgment is reversed, with costs, and the cause remanded for a judgment against the declaration, upon the demurrer to the second plea.

Spring Term  
1833.

Griffith et al  
vs.  
The Com'lh.

A declaration in debt, for a *devastavit*, averring that *estate of intestate* came to the hands, possession, “*or knowledge*” of the adm'r, sufficient &c. (not, that *goods and chattels*, sufficient &c. came to his hands to be administered &c.) is bad on demurrer.

*Plene administravit* is a good plea (by statute,) to an action of debt for a *devastavit*.

Plea of *nil debet*, or of covenants performed, to a declaration in debt, for a *devastavit*, is bad, on demurrer.

Property of a decedent which (by act of Nov. 1821,) is exempt from execution, passes to the widow and heirs, if any; and is not assets to be administered.

Spring Term  
1833.

MOTION.

## Miller vs. Boyd---Sheriff.

[Messrs. Morehead and Brown for Plaintiff: Messrs. Marshall and Julian for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

May 8. Judge UNDERWOOD delivered the Opinion of the Court.

If notice of a motion be given, but not entered in court on the appearance day specified in the notice, it is null, and there can be nothing done upon it:

If the motion is entered on the day specified in the notice, it becomes a cause in court, and stands continued (no order necessary) from day to day, or from term to term, until disposed of.

Motions entered and continued, should be docketed with the other causes, and stand for trial in their turns.

THIS was a motion for failing to return an execution, as required by law. The notice required the defendant to appear on the fourth day of the March term of the Franklin circuit court, in the year 1831. On that day the notice was entered, and the motion laid over until the sixth day of the term. No further notice seems to have been taken of the motion until the tenth day of the term; when an entry was made, continuing the motion until the fourth day of the next term, at the costs of the defendant. On the fifth day of the next term, the defendant again obtained a continuance, at his costs, until the fifth day of the October term. At the October term, the defendant procured another continuance until the next term, generally, without fixing any particular day when the motion should be tried. The next notice taken of it, is on the sixth day of the July term, 1832, when it was laid over, by consent, to the seventh day of the term. On the tenth day of the term, it was continued to the sixth day of the next term. On the seventh day of the next term, the motion was fully heard.

The court, on consideration, ordered the motion to be discontinued, because it had not been regularly continued; and the plaintiff excepted.

We think the court erred. If a notice be given, and not entered on the day the party is notified to appear, it thereby becomes null. Any proceedings thereafter, founded upon it, unless the defendant enters his appearance, would be illegal. But when the notice is entered on the day the defendant is notified to appear, he is then regularly in court, and the motion may be continued

from term to term, like any other suit, without setting it for hearing on a particular day of the ensuing term. The clerk should docket it, like any other cause, after a continuance ; and if it be not reached on the day set for hearing, it would lie over like any other suit, and the party and his witnesses should attend upon it accordingly.

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1833.

*Lightburn*  
vs.  
*Cooper.*

In this case, the record shews that the defendant was in court, making motions for continuance term after term, and that he appeared, by his attorney, and was fully heard on the day the motion was submitted for the adjudication of the court. The only object of the notice was to bring him into court, to litigate the matter. He could not infer any abandonment of the motion as he might have done, had there been a failure to enter the notice, on the day it was returnable. We think the failure to notice, or enter, on record, a continuance of the motion from day to day, after the parties were in court, did not put them out of court.

Wherefore, the judgment is reversed, with costs, and the cause remanded for a new trial.

## Lightburn vs. Cooper.

APPEAL FROM 14 273  
A. J. P. 106 154

[Messrs. Morehead and Brown for Plaintiff: Messrs. Wickliffe and Wooley and Mr. Chinn for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 8.

LIGHTBURN, as assignee of Johnson, sued Cooper, before a justice of the peace, upon a promissory note for twenty five dollars ; and having failed in the country, appealed to the circuit court, where Cooper again succeeded

Instructions of the court which assume, or presuppose, a fact proper for the decision of the jury, should not be given.

After proof had been introduced which tended to shew, that Johnson had sold Cooper a clock, at the price of twenty five dollars, and warranted it to be "a good time piece," but that it was afterwards ascertain-

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1833.

*Lightburn*  
vs.  
*Cooper.*

The warranty of any thing sold, *as to quality* (as that a clock is a good time piece) is no warranty of its value.—If there was no fraud, or concealment, the sale and delivery of the commodity (however worthless) is sufficient to uphold an obligation for the price.

Where a commodity was sold and warranted, and proves defective, when there was no fraud in the sale, nor right to return it reserved, a tender of it back, if refused, does not rescind the contract.—The remedy is by suit on the warranty.

If there was fraud in the sale of a commodity, tendering it back, in due time, rescinds the contract.

So also, where there was an agreement that it might be returned; or where the seller receives it when tendered.

ed to be of but little, if any value, *as a clock*, and had been tendered by Cooper to Johnson, for the purpose of rescinding the contract, the court refused to instruct the jury, that "if they believed that Johnson warranted the clock to be a good time piece, at the time of sale, and it was not a good time piece, as represented, and Cooper, in a reasonable time after said discovery, tendered it back to Johnson, they should find for the appellee;" or that, "if they believed that the plaintiff made a false representation of the goodness of the clock, and that the defendant offered to return it in a reasonable time after the discovery, they must find for the defendant." But gave the following instruction: "If the jury find from the evidence, that the clock, for which the note was given, was of no value at the time of sale, they will find for the appellee." And verdict and judgment were rendered for the appellee, accordingly.

The instruction thus given cannot be approved, as a proper exposition of the law applicable to the case.

*First.* There was no positive proof that the sale of the clock was the consideration of the note; and that fact seems to be presupposed by the instruction.

*Second.* The fact that the clock was of no value did not, *per se*, destroy the legal obligation of the note. There is no implied warranty of value. The purchaser took the clock as the seller held it. Its value was, of course, contingent. The prospect of value and of gain was the consideration, and was a sufficient legal consideration, unless there had been fraudulent representation or concealment.

But, as the case must be remanded for a new trial, and the same questions which arose on the former trial, may recur, it may not be improper to notice also, the propositions which were overruled by the circuit court.

Unless there was fraud in the contract; or the privilege of returning the clock had been reserved, when the contract was made; or the plaintiff had received it when it was tendered, the tender did not operate as a rescission of the contract, although there was a warranty and a breach of that warranty. As long as the contract remain-

ed open and unrescinded, by the acts of the parties, or by the operation of law, a suit upon it is the only remedy.

If there had been fraud in the sale, a tender of the clock, within a reasonable time, would have rescinded the contract by operation of law.

Had the seller received the clock when tendered ; or had the buyer reserved the right to return it, if it was not a good one, the original contract would have been rescinded by the acts, or the contract, of both parties, and could not have been enforced by either of them. But a simple warranty and tender, even though there has been a breach of the warranty, cannot operate as a rescission.

Upon this point there are some contradictory *dicta*. But both principle and preponderating authority sustain the foregoing doctrines. They were so settled by the supreme court of the United States, in the case of, *Thornton vs. Wynn*, (12 *Wheaton*, 184,) after a careful survey and analysis of the authorities.

A false representation respecting a matter which the buyer has an opportunity of ascertaining, by his own observation, or trial, before or at the time of the purchase, will not be deemed fraudulent of itself and alone, nor bind the seller. If the seller knew that the clock was not a good time piece, his false representation was fraudulent ; and then the tender of the clock would have operated as a rescission of the contract. But, without such knowledge, actual or presumed, the simple fact, that his representation was untrue, would not affect the legal obligation of the contract. Such a representation, made in good faith, does not amount even to a warranty ; and we have seen that the warranty and subsequent tender did not rescind the contract.

The circuit court was, therefore, right in overruling the second and third propositions.

Wherefore, for the erroneousness of the instruction which was given, the judgment must be reversed, and the cause remanded for a new trial.

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1838.

*Lightburn*  
vs.  
*Cooper.*

False representations by the seller, relative to what the buyer might examine for himself, do not amount to a fraud, nor to a warranty. If the defects are such as could not be discovered, with ordinary care, false representations on those points, are fraudulent, and ground for rescission, by a return, or tender in due time,

Spring Term  
1833.

CHANCERY.

**Fenwick against Macey's Executors.**

[Mr. Monroe and Mr. Sanders for Plaintiff : Mr. Haggin and Mr. Crittendon for Defendants.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

May 10.

The Judges in this case delivered separate Opinions.

Various contracts between Fenwick and Macey : in particular, an advance of money by M. to F. in 1807, upon a sale of three slaves ; which F. retains, at a hire equal to about 25 pr. ct. pr. an. on the money advanced.

JUDGE UNDERWOOD :—On the 10th of September, 1807, Alexander Macey, and Fenwick, the plaintiff in error, entered into a contract, from which it appears that Macey advanced one thousand and twenty six dollars, twenty six cents to Fenwick, who thereupon conveyed three slaves (Ralph, Ambrose and Ann) to Macey, who immediately hired them to Fenwick, at the rate of two hundred and fifty dollars per annum.

On the 1st of May, 1807, it appears by a contract between the same parties, that Macey lent Fenwick eight hundred dollars, to secure the payment of which, Fenwick assigned to Macey a lease on H. Brock, upon which there was a rent reserved of two hundred dollars per annum. It is agreed by this contract, that Macey is to receive the rent from Brock, and that if Fenwick does not return the eight hundred dollars within three years, then the whole lease and all its benefits shall be Macey's. The lease of Brock expired on the 1st of January, 1819. Brock paid the rent to Macey ; consequently, he received twenty four hundred dollars, in the course of about twelve years, for the eight hundred dollars lent.

On the 14th January, 1811, for the consideration of three hundred dollars, Fenwick made an absolute sale to Macey, of a hundred and fifty, or a hundred and sixty acres of land, in which Fenwick held a term for eight years.

On the 17th September, 1813, for one hundred and twenty dollars, to be paid on demand, and in consideration of covenants to keep in repair &c. Fenwick assigned and transferred to Macey, for the term of five years



and five months, all the residue of his land on Elkhorn, held under the lease from Cox to Edwards; except the yard, garden, pasture, mill and timber yards, and the houses. This contract contains a stipulation, that whenever Fenwick pays the hundred and twenty dollars, the leased premises are to revert to him.

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1833.

*Fenwick*  
vs.  
*Macey's ex'rs*

On the 5th of September, 1813, Fenwick, for two hundred dollars in hand paid, conveyed to Macey, three yoke of oxen, a waggon, three horses and thirty five head (first choice) of hogs,—reserving, however, the liberty to redeem at any time before Christmas thereafter.

The evidence warrants the belief, that the use of the land, mentioned in the contracts of 1811 and 1813, for one or two years, at most, was fully worth the amount advanced by Macey for these lands; and that the hire of the slaves was charged to Fenwick as cash, and constituted at least a part of the consideration or advances made by Macey for the land.

Macey, a few years after the contract relative to the slaves had been made, took Ann into his possession, and thereafter, the negro men continued with Fenwick, at a hire of two hundred dollars per annum. Ann has had five children.

M. in 1809,  
takes possession  
of one of the  
slaves.

In June, 1822, Fenwick filed his bill, asserting a right to redeem the slaves, upon the ground that the contract between him and Macey should be regarded as a mortgage. He, moreover, claims a settlement of accounts between him and Macey, and for general relief, &c.

Bill, by F. filed  
in 1822, to re-  
deem the slaves,  
which he alleges  
were, in reality,  
only mortgag-  
ed, and for a  
settlement.

The executors of Macey, he having died before service of process, denied all personal knowledge of the transactions set forth in the bill, and insisted upon lapse of time as a bar to the relief sought.

Answer, by the  
ex'rs of Macey,  
(now deceased)  
relying on the  
lapse of time in  
bar of relief.

There can be no doubt, that all the contracts between Macey and Fenwick, except that dated the 14th of January, 1811, should be treated as mortgages. Their principal object seems to have been, to secure the sums advanced, with an interest at the rate of twenty five per cent per annum. The important question is, what length of time should bar the right of the mortgagor to

The contracts  
of sale—having  
been intended  
originally only  
as securities—  
are to be treat-  
ed as mortga-  
ges.

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Bill dismissed in  
the circuit ct.

Statutes of lim-  
itation are rules  
of decision in  
chancery.

A bill to assert  
a right of more  
than 20 years  
standing, in fa-  
vor of one la-  
boring under no  
disability, will  
not, in general,  
be sustained.—  
But there are  
exceptions: in-  
stance,—in be-  
half of an occu-  
pant defending  
his freehold.

redeem slaves, and a term for years, in the hands of the mortgagee?

The circuit court dismissed Fenwick's bill, upon the ground, that as five years adverse possession was a legal bar to the recovery of a slave in an action at law, the chancellor should adopt the same rule, and apply it to bar the mortgagor's equity of redemption, after the mortgagee had been in possession five years.

The statute of limitations does not in terms apply to suits in equity. Still its provisions have, in many cases, been adopted by the chancellor, and furnish the rule of decision in his court.

It is a general rule with the chancellor, that he will not entertain a bill to set up a right, in favor of a person laboring under no disability, after a lapse of twenty years. He will tell the man who sleeps upon his rights for twenty years, to sleep on. There are, however, exceptions to this rule. One exists in behalf of the occupant of a freehold, who asserts an equity of more than twenty years standing, in order to protect his possessions. Whether this rule has been adopted in analogy to the statute of limitations, which bars the right of entry after twenty years adverse possession; or whether it is more properly based upon a presumed dereliction of right, and the mischiefs likely to result from asserting a stale demand; or whether its proper foundation is a satisfaction of the demand to be presumed after a lapse of twenty years, in the same manner that we presume a bond to be paid after twenty years, without accounting for the delay, are inquiries which need not now be discussed at length. Perhaps it might be said with truth, that the rule is supported by all these considerations, and that no one singly would be sufficient to account for its origin and application to all the cases. It is clear that the chancellor, in applying the rule, has allowed those to escape its operation who were able to bring themselves under any of the disabilities provided for in the statute of limitations; and therefore it may have been thought, that the rule itself, depends for its existence, exclusively upon the analogy which it bears to the statute.

It is agreed on all sides, that the chancellor will not entertain a bill in behalf a mortgagor against the mortgagee, to redeem the estate after it has been held twenty years by the mortgagee, unless some acknowledgment of the mortgagor's right in the mean time, can be satisfactorily shewn. Those who place the existence of the rule exclusively upon analogy to the statute, however, contend, that as five years is the limitation at law for the recovery of a slave adversely held, the chancellor is bound to modify the rule in relation to slaves, so as to keep up the analogy, and preserve uniformity as to the rights of litigants in courts of law and equity. It cannot be denied, that courts of equity ought, in adopting and applying rules, to be governed by that policy which the legislature of the country prescribes. The chancellor does conform to it. If the limitation of a writ of error be ten years, the chancellor will allow a bill of review within that period. If the legislature reduce the limitation to five or to three years, the chancellor conforms to the change, and will not allow a bill of review unless it be prosecuted within the period thus shortened.

Upon the same principle, of conforming to the policy indicated by the legislature, the chancellor should, where slaves are adversely held by the mortgagee, for more than five years, refuse a redemption when applied for by the mortgagor. To put a strong case, if possession of a slave be with the mortgagee, and he were to notify the mortgagor that his right to redeem was denied, and that the mortgagee held the slave in his own right, free from incumbrance, the chancellor could give no relief after five years acquiescence on the part of the mortgagor, in the possession of the mortgagee, under such circumstances. If he did, it would outrage the policy of the legislature, as manifested by the statute.

The time which the mortgagor of a slave has to redeem in, may therefore depend upon the nature and character of the possession held by the mortgagee. If the possession be adverse, he must seek his remedy within five years. If it be not adverse, he may have twenty years to redeem, but no longer. Why not a longer time when the possession is not adverse? Because, after twenty

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*Fenwick*

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*Macey's ex'rs*

Mortgagor cannot maintain a bill to redeem after 20 years possession by the mortgagee, unless the latter has made some acknowledgment of the right within that time. *Post* 381. See, also the opinion of the Ch. Jus. in this case.

The mortgagor of slaves can not enforce a right to redeem, after an adverse holding has been assumed by the mortgagee, and continued for 5 years

Nor after twenty years, (in general,) whether the holding was adverse, not.

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1833.

*Fenwick*  
vs.

*Macey's ex'rs*

A mortgagee in possession, who has not clearly manifested his intention to hold as absolute owner, has a title and possession not adverse to, nor inconsistent with, the rights of the mortgagor. The mortgagee's estate, in many respects, resembles a trust; and he is generally considered in chancery as a trustee in whose favor the principle of the statute of limitations, or bar by lapse of time, does not apply, until a satisfaction, or dereliction, of the demand secured by the mortgage, must be presumed.

years, the equity is stale; and the presumption is strong, that the mortgaged debt is satisfied; and good policy requires, that things long acquiesced in, should not be disturbed, on account of the difficulty of reaching the whole truth in regard to them.

It becomes important to enquire what acts constitute an adverse possession on the part of the mortgagee. It has been contended, that as soon as he reduces the mortgaged property to possession, he holds it adversely. That cannot be the law. The title of the mortgagee is absolute in appearance merely. Originally it was in substance absolute after forfeiture of the condition. But courts of equity interposed, and created the right of redemption after forfeiture, for the purpose of relieving misfortune and restraining avarice. The equity of redemption, as it is called, so created, is attached to the estate in the possession of the mortgagee, and he holds it subject to this equity. His holding is entirely consistent with this equity, and not adverse to it, unless some act is done demonstrating an intention to hold the estate as the absolute property of the mortgagee, disencumbered from, and at war with, the mortgagor's right to redeem. The mortgagee coming into possession by ejectment, detinue, or consent, nothing being said or done to the contrary, takes the property, and holds in conformity to his title, and that title is consistent with the mortgagor's equity, which goes with the estate; and therefore the possession is not adverse. The mortgagee holds, in many important particulars, as a trustee, and he is often called a trustee in the books. He has certainly an interest, and he holds for his own benefit, as well as that of the mortgagor. He has the right to appropriate the profits to his own use and benefit, and is not compelled as in ordinary trusts, to pay them over, annually, to the mortgagor, as *cestui que trust*. But then, the profits thus appropriated, must be applied to the extinguishment of the mortgagor's debt, and when the whole debt is discharged, the profits thereafter must be paid over, with the estate, to the mortgagor. The mortgagee holds the estate subject to these well settled principles, and being a trust in many important respects, the statute of limitations has no ap-

plication. Chancellor Kent, in the fourth volume of his Commentaries, 160-1 says, "the mortgagee in possession holds the estate strictly as a trustee, with the duties and obligations of a trustee; and if he takes the renewal of a lease, it is for the benefit of the estate, and not for his own benefit. He can make no gain or profit out of the estate which he holds merely for his indemnity." He has uniformly been required by this court, to account for the profits. *Hard. 6. 1 Bibb, 198. Reed vs. Lansdale. Ballinger vs. Worley.* In the case of *Breckenridge vs. Brooks &c. 2 Mar. 339*, mortgagee in possession is treated and called a trustee, and as such refused an allowance for his trouble in managing the mortgaged estate. In *Morgan's heirs vs. Boone's heirs, 4 Mon. 297*, the court regard the mortgagee upon the footing of a trustee, so far as to prevent him from purchasing in an adverse title, and setting it up against the mortgagor. These are the leading cases, and their principles have been invariably followed. The conclusion from them, is, that the estate held by mortgagee in possession, although not a technical trust, created by express contract, and evidenced by a formal conveyance, is nevertheless of that character of trusts denominated *constructive* in the books. Equity construes it into a trust, for the purposes of justice, in the same way that it has created a right to redeem, in the face of a conveyance which has become absolute.

The application of the statute of limitations in cases of trust, is considered at length in *Kane vs. Bloodgood, 7 John. Cha. Rep. 111*. Chancellor Kent there refers to the case of *Lockey vs. Lockey*, decided in 1719, by Lord Macclesfield, and says its doctrine is, "that the trusts which are not within the statutes, are those which are creatures of the court of equity, and not within the cognisance of a court of law." This rule fully embraces the case of mortgagee in possession, if he holds in trust. There is no way to reach him at law, and without the aid of the chancellor, he would hold the estate, and all its profits forever.

It may be said, that the doctrine of Lord Macclesfield would allow an indefinite period for the assertion of an equity of redemption, and prove that there was no bar,

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or that the mortgagee in possession could not be a trustee. That he does occupy the attitude of a trustee for many purposes, has already been shewn; and that twenty years possession by the mortgagee, nothing else appearing, does bar a bill filed by the mortgagor to redeem, he laboring under no disability, is indubitably settled by an irresistible current of authority. And most of the authorities, it may be urged, make the bar operate, upon the ground, that the statute of limitations is the foundation of the chancellor's rule. If, then, it be the statute which bars a redemption in land after twenty years possession by the mortgagee, why shall not the statute bar a redemption in a slave after five years possession? All difficulty in giving a satisfactory answer, will probably vanish, by a few remarks founded on obvious principles.

In the first place, the rule in respect to trusts "*which are creatures of the court of equity*," is not one which allows the mortgagor a period without limitation in which he may redeem. The rule, as laid down by Lord Macclesfield, only says the statute will not apply. But it does not thence follow, that the chancellor will not apply a limitation of his own creation. This he will do upon Lord Redesdale's principle, quoted in *Kane vs. Bloodgood*, that every new right of action in equity, that accrues to the party, whatever it may be, must be acted upon at the utmost, within twenty years." Or upon Judge Pendleton's idea, that the chancellor refuses to let the mortgagor redeem after the lapse of twenty years, not in analogy to the statute which takes away the right of entry, but because of a presumed dereliction of right resulting from lapse of time, in the same manner that a bond or judgment is presumed to have been paid after twenty years, unless something appears to repel the presumption. *Ross vs. Norvell*, 1 *Washington*, 14. This last case was a redemption of slaves after five years.

The right of the mortgagor of slaves to redeem, is not limited to five years; he may maintain his bill (where there has been no ad-

But, *secondly*: if it be granted that the limitation of twenty years is based upon the statute exclusively, does it necessarily follow, that the chancellor must apply a limitation of five years, when the mortgagor seeks to redeem a slave? The letter of the statute does not apply to suits in equity. The chancellor adopts its spirit and

policy, and these, if not directly opposed to a limitation of five years, as the time within which a slave should be redeemed, fail to furnish any satisfactory reasons in favor of such a rule. Why does the legislature prescribe a limitation at all? It is, because those who lie by for a long time, and will not assert their rights, are presumed to have none. The moving spring of human action is self-interest; and men are rather apt to be too forward in asserting claims unsupported by right, than to delay bringing forward just demands. Consequently suspicion falls with propriety upon a stale demand. Its age furnishes reason to apprehend, that its assertor's negligence has been the result of cunning—with a view to take advantage of the death or removal of witnesses, or the like, rather than a careless disregard of his interests. Looking to the spirit of the statute, how ought a chancellor to apply it in favor of a mortgagee let into possession of a slave or chattel? He is not presumed to be satisfied short of twenty years, and at any time within that period, he may have his action at law upon his bond. A presumption cannot arise in less time, that the mortgagor is without right, or that he has abandoned his right, especially when the slave goes into the hands of the mortgagee as a *vivum vadium*, and is daily extinguishing the principal or interest of the debt. The mortgagor derives a benefit, as well as the mortgagee, and therefore, it may be entirely compatible with the interest or selfishness of the mortgagor, to acquiesce in the possession of the mortgagee. The statute, founded upon the principle, that submission to a deprivation of property, is evidence of abandonment or want of right, cannot therefore apply, in spirit and policy, to a case where it may be the interest of the equitable owner to permit the holder of the legal title to possess for five years. When all the considerations are united, to wit, the trust character of the mortgage; the want of ground to presume a dereliction of right by the mortgagor, or that the mortgagee has been paid, and the interest which the mortgagor may feel in permitting the property to go into the hands of the mortgagee—they are sufficient to repel the reasons urged in favor of adopting five years as a bar to the redemption of slaves.

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verse holding of five years duration,) at any time within 20 years after the right accrued. And the mortgagee may enforce payment of his mortgage money, by bill of foreclosure, at any time, within 20 years. [Ch. Jus. concurs: see his opinion, *post*.—Judge Nicholas thinks the right of redemption should be barred after five years. See *Dissent, post*, 288.]

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If five years were sufficient to bar the mortgagor's equity of redemption in a slave, the same time ought to bar the mortgagee's lien. There should be reciprocity in the rule. Is not the possession of the mortgagor after forfeiture, just as adverse in its character as the possession of the mortgagee? If such possession for five years, by the mortgagor, would destroy the lien, it would tend to make rigorous collectors of indulgent creditors. They must toërcé payment, or lose their securities. A mortgage is a mere security—an appendage to the debt. It would lose its character if five years lapse should exonerate the chattel from the lien, and thus separate what the law has united. The one should continue as long as the other, and the possession of the mortgagor should be regarded as compatible with, and not adverse to, the rights of the mortgagee, and *vice versa*.

View of the facts conducing to show how the mortgagee in this case held, and that his possession was not adverse. [Judge Nicholas takes a different view. See his dissent, *post*, 287.]

The case is brought down to the enquiry, whether Macey did any act which converted his possession of the slaves into an adverse and hostile one. If he were a trustee, in the technical sense of the term, an adverse possession might aid him. "So long as the trust is a subsisting one, and admitted by the act or declarations of the parties, no doubt the statute does not affect it, but when such transactions take place between trustee and *cestui que trust*, as would, in the case of tenants in common, amount to an *oust* of one of them by the other, I can hardly suppose that a court of equity, would consider length of time afterwards as of no consequence." *Kane vs. Bloodgood*, (*supra*.)

The evidence shews, that Macey frequently expressed his willingness, if he did not expressly acknowledge Fenwick's right to redeem, long after the slaves became his absolute property, according to the face of the papers. Voorhies proves Macey's admissions, that there were large and unsettled accounts between him and Fenwick. "Deponent also called upon Macey, at the request of Fenwick, to settle their accounts, and there were several appointments made, but for some cause or other, they never all got together." Such appointments and acknowledgments are inconsistent with the idea of an adverse possession of the slaves. The time when these acknowledgments and appointments were made, does not dis-



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tinctly appear. They are not relied on to take the case out of the operation of the statute, but to negative the idea, that Macey did any act which ought to bring his case within the influence of the statute. The control and use of the property, coming into possession by consent, as mortgagee, is not hostile, or adverse.

It may be urged, that the money advanced by Macey to Fenwick, for the slaves, together with legal interest thereon, was more than paid, five years previous to the institution of this suit ; and that the possession of Macey should be regarded as adverse from the time that he had received his principal and legal interest. Conceding that the mortgagee who retains the estate after his debt is fully paid, is thenceforth a wrong-doer ; and that the chancellor might, on that account, find sufficient reason to limit the right to redeem a slave to five years thereafter ; yet in the present case, there are strong grounds on which to resist the application of such a rule. The transactions between Macey and Fenwick were usurious. Although the principal and legal interest were paid more than five years before the institution of this suit, the debt was not discharged, as the parties recognised it to exist. Fenwick was paying, and had been paying for years, usury at the rate of twenty five *per cent. per annum*, or very near it ; and if his payments should be applied towards the extinguishment of the usury, then there would remain a balance of the principal due within five years next before the institution of this suit. Can Macey now insist, that the principal and legal interest were more than paid five years before suit brought, by making the application of the usury received to their discharge, and thereby lay the foundation for an adverse possession from the extinguishment of the debt ? He ought not to be permitted to do it. Were it allowed, he would first violate the law by usurious exactions, and then take advantage of his own wrong, to protect himself against an equitable demand for an account and surrender of the property. Such a result cannot be tolerated. On the contrary, as he insisted that Fenwick owed him largely, and as Fenwick paid upwards of seven hundred dollars, in 1817, according to his account, the debt, as the

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parties regarded it, was not fully discharged until within five years next preceding the institution of this suit. Under such circumstances the limitation should only begin to run from the time at which both parties regarded the debt paid, or ought to have so regarded it, including the usury.

The foregoing principles when applied to this case lead to the following conclusions:—

The mortgagee, in possession of slaves, is liable to the mortgagor, for hire;—an allowance for raising to be deducted from the hire. But hire accrued 5 years before the suit, cannot be recovered; because of the bar by lapse of time.

Five years bars the claim, of one who assigned a lease, a security, for the rents which the assignee received and retained for usury.

*First.* That Fenwick is entitled to redeem Ann and her children. And as it satisfactorily appears, that Macey received his principal and legal interest thereon, more than five years before the institution of this suit, the redemption must be effected by taking an account of the hire of Ann and her children, for five years before the commencement of the suit, down to a day, to be fixed, when they shall be surrendered; and after deducting therefrom a proper allowance for the expense of raising &c. the balance, if any, must be decreed to Fenwick, with the slaves.

*Second.* The lease on Brock, assigned to Macey, was a security, and covered a large amount of money. Fenwick is entitled to no relief on this transaction, except for the two last years rent. The rent for the other years, after paying the eight hundred dollars, and legal interest, cannot be recovered; because Fenwick's right is barred by time. But as to the rent of 1817 and 1818, to wit, four hundred dollars, for the two years, Fenwick must have a decree for it; and if the raising of the young negroes should exceed the amount of hire, then the excess must be deducted from said four hundred dollars.

*Third.* Fenwick's title to Ralph and Ambrose should be confirmed, and the purchase made of them by his son, should be cancelled. Fenwick should recover no hire for these slaves, as they remained in his possession.

*Fourth.* All other matters between the parties, are either not sufficiently put in issue by the pleadings, or are barred by time, and no further attention need be given to them.

Wherefore, the decree is reversed, with costs, (*Judge Nicholas* dissenting,) and the cause remanded for proceedings in conformity to this opinion.

**JUDGE NICHOLAS:**—In 1807, Fenwick made a bill of sale to Macey, for two negro men and a woman; redeemable in two years, on the payment of a thousand and odd dollars. This though ostensibly a redeemable purchase, yet, according to settled rule, is treated by the courts only as a mortgage. Fenwick agreed to pay two hundred and fifty dollars a year, as hire for the negroes; and if they died before the end of the two years, the loss was to be his. In 1809, Macey took the woman into possession; Fenwick retaining the men, and agreeing to pay two hundred dollars a year as their hire. Macey continued in the undisturbed possession of the woman till June, 1822; when Fenwick filed his bill to redeem. The right to redemption is met, by the executors of Macey, by a plea of the statute of limitations. From the allegations of Fenwick, it is very clear, that he had paid off the mortgage debt, with its legal interest, more than five years before the institution of the suit, and there is no proof of any acknowledgment, or recognition, of the right of Fenwick to redeem, by Macey, within five years before suit. It is also in proof, that, as far back as 1815, Fenwick frequently insisted, in quarrels with Macey, that he had more than paid the mortgage debt. Fenwick alleges, that he paid Macey, by sawing done, and lumber furnished for him, from 1812 to 1817, inclusive. In January, 1811, Fenwick executed another mortgage to Macey, on other property, for the payment of three hundred dollars, which it appears was the balance of hire then due. The accounts exhibited by Fenwick of payments made in the years 1812–13–14–15 and 16, shew, that, prior to 1817, he had paid off all the hire that could have accrued from January, 1811, to 1817, together with the principal of the sum for which the bill of sale of the negroes was originally executed, or if there was any balance, it was very trifling, and must have been absorbed before June, 1817, by the large account for sawing, which Fenwick says was incurred during all that year.

My understanding of the proof, is, that Macey never did admit, nor did Fenwick claim, that Macey held the negroes as mortgagee. On the contrary, the inference I

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**DISSENT of Judge Nicholas.**—His view of the evidence; and conclusion, that the defendant's testator did not hold the slaves as mortgagee; but took a title indefeasible after the expiration of two years allowed to the plaintiff to redeem in.—His opinion, also, that if the sale was to be treated as a mortgage, yet after the mortgage debt was, in fact, discharged, the mortgagee's continued possession ought to be considered—there being no admission on his part to the contrary—as adverse to the right of the mortgagor; and that, the possession having so remained for five years, the mortgagor's bill for redemption was barred by force of the statute.

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deduce from the proof, is, that they both considered Macey as having the absolute right, after the expiration of the two years allowed to redeem, if he chose to exercise it. The declarations of Macey, repeatedly made, that he was Fenwick's friend, that he wanted no advantage of him, that he should have the right to redeem at any time by, paying the balance due, &c. I understand as a mere disclaimer of any intention to avail himself of the advantage he supposed himself to hold, as absolute owner of the property then, and not as a recognition of any right in Fenwick to redeem, independent of Macey's will, or as an admission, that the original transaction was a mortgage. There is no proof whatever of any such declarations subsequent to 1816. One witness states that in 1809, both Fenwick and Macey told him the latter had purchased the slaves for twelve hundred dollars.

As to the woman, therefore, and her issue, who are the principal subjects of controversy, I consider Macey as having had an adverse possession, undisturbed, from 1809, when he first took possession, until the institution of the suit, and consequently, that Fenwick's right to redeem is barred by the statute of limitations.

Examination of the question, whether the bar from lapse of time, as recognised in chancery, is adopted in conformity to the legislative will, indicated by acts limiting the times within which suits at law may be brought; or upon considerations of public policy, presumption of dereliction of right, the probable injustice of stale claims &c.—and conclusion, that the bar, in chancery, as at law, is the effect of the statute.

But should I be mistaken in this view of the case, then the question is presented, whether a mortgagee of a slave, who takes possession originally as mortgagee, and whose debt is afterwards discharged, more than five years before the institution of suit, is protected against the mortgagors's right to redeem, by the statute; there having been no admission, or recognition, of the right of redemption, or of a holding as mortgagee, within the five years. The proper solution of this question depends essentially upon ascertaining the true principle, or basis, of the bar from lapse of time, applied by the courts to all equities of redemption.

In the leading case of *Ross vs. Norvell*, 1 *Washington*, 14, Judge Pendleton expressed an *obiter* opinion, that, the rule which bars an equity of redemption of land after twenty years, is not based on any analogy to the statute of limitations; but exclusively upon a presumed dereliction; because, if the statute were made to apply, it would not be the limitation of the right of entry that

would be adopted, but that of the writ of right, and because of a supposed trust between the parties, which he said, is not within the operation of the statute. This opinion received an *obiter* recognition and confirmation from this court, in the case of *Young vs. Wiseman*, 7 Mon. 270, and was apparently acted on, and became the ground of decision, in *Mims vs. Mims*, 3 J. J. Mar. 103. *Dicta* are also to be found in other books of respectable authority, that the redemption of lands is barred after twenty years, upon a presumed release, in analogy to the presumption of payment of a bond or judgment. If these authorities contain a correct exposition of the law, I should be inclined to concede, that five years possession of a slave by the mortgagee, after payment of the debt, would not bar the equity of redemption; for if there be such a trust between mortgagor and mortgagee, as will prevent the statute from running in favor of either, it would be difficult to create a bar short of twenty years, unless there has been some overt act of a determinate character on the part of the mortgagee, indicative, or productive, of an adversary holding.

But after a thorough examination of the subject, I have a firm conviction, that the rule was not adopted on the mere presumption of a dereliction of the right, but in obedience to, and in strict conformity and analogy with, the statutory limitation of the right of entry. The rule adopts all the disabilities provided for by the statute, and allows none other. In England, it gives ten years after removal of disability, and no more, without reference to the time of its ceasing, whether within or after the twenty years. It does not allow the lapping of disabilities. When time once commences running, it continues, notwithstanding the intervention of a disability. All this was announced in the early case of *White vs. Ewer*, 2 Vent. 340, and has been uniformly followed ever since. In that case, where the Lord Keeper was assisted by two justices, it was declared, that though such matters were to be governed in equity by the course of the court, yet that mortgages should not be relieved after twenty years. For that the statute did adjudge it reasonable to limit the time of one's entry to twenty years, un-

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less there be such particular circumstances as may vary the ordinary case, as infants, *femes covert* &c. provided for by the very statute, for it is best to square the rules of equity as near the rules of reason and law as may be. In *Jenner vs. Tracy*, 3 P. Wms. it was said, "that as twenty years would bar an ejectment, there was the same reason for allowing it to bar a redemption." See also, *Belch vs. Harvey*, 3 P. Wms. 288. *Demarest vs. Wynkoop*, 3 John. Chy. 129. *Cov'ty's Powell*, 363. *Matthews on Legal Presumptions*, 345 to 368.

This full adoption of the statutory bar throughout, shews, conclusively, that the rule is not based upon a mere presumed dereliction; for legal presumptions do not work by any such arbitrary, inflexible standards; but give and yield, and adapt themselves to the circumstances of each particular case, as they arise.

In *Aggas vs. Pickerell*, 3 Atk. 225, Lord Hardwicke, after an investigation of the authorities, was disinclined to allow a demurrer to a bill for redemption, after twenty years, because it would go to preclude the complainant from shewing himself within some of the exceptions to the statute, yet he sustained a plea of the statute. Now, this could not be done unless the statute, *ex proprio vigore*, operates upon a bill in equity, or, which is the same thing, becomes, when passed, a rule of court, by adoption. For there is a plain distinction between length of time as a bar, and as mere evidence of a bar. In the former case, it amounts to a positive rule; in the latter it is mere presumption, and is in itself no legal bar. And the evidence of a fact can properly no more be plead in chancery than at law. Good pleading, in either court, requires, that facts, and not the mere evidence or presumption of them, should be relied on by way of plea in bar. If twenty years possession by the mortgagee, creates but the presumption of the fact of dereliction or release on the part of the mortgagor, there would be the same necessity for pleading and relying on the release or dereliction in chancery, that there would be for pleading payment to a stale bond, when its antiquity is relied on as the evidence of payment.

The supreme court in *Elmendorf vs. Taylor*, 10 *Whea.* 168, evidently deduce the conclusion from a review of the cases, that lapse of time is a bar to redemption, in analogy to the statute of limitations. The court, also, in that case, vindicates the propriety of limiting all equitable claims in analogy to the limitation of the right of entry, instead of the writ of right, as contended for by Judge Pendleton. From a review of these authorities, it cannot be doubted, that if the right of entry had been limited to twenty five years, the same period would have been allowed for redemption, notwithstanding the presumption of payment of a bond had remained at twenty years.

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The adoption of the statute, is by no means peculiar to the case of mortgages, but pervades the whole system of equitable jurisprudence. It was in settling the question, that a bill of review should be restricted to twenty years, in analogy to the English limitation of a writ of error, in the case of *Smith vs. Clay*, Amb. 645, and 3 Bro. Ch. 639, that Lord Camden used the following pertinent, forcible and often quoted language:—"As the court has no legislative authority, it cannot properly define the time of bar, by a positive rule to an hour, a minute, or a year; it was governed by circumstances. But as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the court of chancery adopted that rule, and applied it to similar cases in equity. For where the legislature had fixed the time at law, it would be preposterous for equity, which, by its own proper authority, always maintained a limitation, to countenance laches beyond the period that law had been confined to by parliament. Therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar. Thus the account for rents and profits, in a common case, shall not be carried beyond six years. Nor shall redemption be allowed after twenty years possession in a mortgagee."

In *Hovenden vs. Annesley*, 2 Sch. and Lef. 637, Lord Redesdale said: "courts of equity have constantly guided themselves by the principle, that whenever the legis-

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lature has limited a period for law proceedings, equity will, in analogous cases, consider the equitable rights as barred by the same limitation." And in *Bond vs. Hopkins*, he thought the statute must be taken virtually to include courts of equity. In *Medlicott vs. O'Donnell*, 1 Ball and Beatty, Lord Manners said the court was bound to adopt the statute, in cases where the equitable and legal title so far correspond, that the only difference between them, is, that the one must be enforced in chancery, and the other at law. See *Kane vs. Bloodgood*, 7 John. Chy. and *Elmendorf vs. Taylor*, 10 Whea. to same effect.

In *Thomas vs. Harrie*, 10 Whea. 146, the language and doctrine of Lord Camden are cited with approbation, and a practical application made, by reducing the time allowed for a bill of review to five years, in analogy to the limitation prescribed by congress for a writ of error.

A still stronger practical illustration of the principle is to be found in *Kane vs. Bloodgood*, where Chancellor Kent frankly recants a previous decision, in which he determined that twenty years was the limitation to a bill for a legacy in conformity to the English rule, without having adverted to the fact, that a statute of New York had authorized suits at law for legacies, which he supposed would bring them within the legal limitation for personal actions in both courts.

The argument of Judge Pendleton—in opposition to all this authority—that the bar to an equity of redemption of real estate, is based exclusively upon a presumed dereliction of right, and not upon an analogy to the statute of limitations, cannot be deemed of any validity whatever. But I will go a step further, and investigate more particularly the force of his objection to the application of the statute, “because of a supposed trust between the parties.”

It is true there is a *quasi trust*, as between mortgagor and mortgagee. The books are full of *dicta* to that effect. The mortgagee can make no profit out of the estate beyond his debt; but when let into possession, is bound to account for the rents and profits, and is allowed no compensation for his services. And we have been referred to the language used, 4 *Kent's Com.* 160, where it is said:



"The mortgagee in possession holds the estate strictly as a trustee, with the duties and obligations of a trustee, and if he takes the renewal of a lease, it is for the benefit of the estate, and not for his own benefit." This language must be taken with great qualification, for though it may be comparatively accurate, in reference to the subject about which the learned commentator was treating, that is, to shew the mortgagee can make no gain or profit out of the estate, yet it is certainly far from accurate, to say of the mortgagee, that "he holds strictly as a trustee" in every respect. That strict relation certainly does not subsist.

There are, no doubt, points of similitude between the attitude of a mortgagee and a trustee. But the points of difference and dissimilitude are many, broad and obvious. In the general, a mere trustee has no interest in the subject of the trust, nor is he allowed to acquire any; whereas, the mortgagee has a direct and important interest in the mortgage property, and can purchase for himself, under execution or otherwise, the equity of redemption. The trustee cannot turn the *cestui que trust* out, or obstruct his getting into possession. The mortgagee can do both. The trustee holds for the exclusive benefit of the *cestui que trust*. If the mortgagee holds for the exclusive benefit of either, it is for his own, and not that of the mortgagor. The satisfaction of the mortgage debt, it is true, is a mutual benefit; but in taking possession, the mortgagee does it with an eye to his own exclusive advantage. He may do it with the assent of the mortgagor; but may, and often does, do so, without such assent, and even in despite of the mortgagor. Therefore, though there be a resemblance, yet the analogy is far from being complete and perfect throughout.

The distinction between them has been noticed and descanted upon by an eminent chancellor, in these terms: "There was a vast difference between trusts, some being express, some implied; some relations formed between individuals, in matters of dealing with each other, and in which it could hardly be said that one was trustee, and the other *cestui que trust*; and yet it could not be well denied, that for some purposes they were so. Of

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Points of difference between estates held strictly in trust, and those held under mortgages. Deduction there from, that parties to the latter are not, like those to the former, exempt from the effect of the statute of limitations, or bar from lapse of time.

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this kind, he took the relation of mortgagor and mortgagee to be. In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do any thing adverse to it; a tenant had also a duty to preserve the interests of his landlord; and many acts, therefore, of a trustee or tenant, which if done by a stranger would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them. But the case of a mortgagee was different, he being at liberty to hold possession, and not becoming strictly a trustee until the money was tendered, and having a right, if he continued in possession for twenty years, to turn round on the mortgagor, and say the estate was his own."

Another distinguished Judge has held, if possible, still stronger language on the same subject: "It is said that the mortgagee is a trustee for the mortgagor. This is founded on mistaken notions of the resemblance of the characters of mortgagee and trustee. The mortgagee, when he takes possession, is not acting as trustee for the mortgagor, but independently and adversely, for his own use and benefit. A trustee in equity is stopped from dispossessing his *cestui que trust*. A mortgagee cannot be stopped, because in him it is no breach of trust. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in the opposite character he accounts for the rents when in possession. He does not, like a trustee, possess a title to the legal estate, distinct and separate from the beneficial and equitable." *Cov'ty's Pow.* 1153.

Until recently, it was deemed a question still afloat in the English courts, whether a mortgagee out of possession for twenty years, was barred in the same manner as the mortgagor would be under like circumstances. *Cov'ty's Pow.* 391. *Matth.* 369. The analogy to the case of mortgagor, and the application of the statute, was denied on the ground, that the mortgagee should be presumed in possession, the mortgagor being but his tenant at will, and the mortgagor's possession, therefore, in legal strictness, his. When this argument, together with some cases which give it an apparent countenance, came to be urg-

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ed, on a recent occasion, before Sir T. Plummer, he said: "It was based on a mere fiction; for there is no actual tenancy, no demise, express or implied. The mortgagor has not even the rights of a tenant at will; he may be turned out of possession without notice, and is not even entitled to emblements. It is only *quodam modo* a tenancy at will. We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded in fact. If twenty years possession will not operate a defence against the mortgagee, I do not see how any period of time, however long, can bar him. If the fiction of a tenancy at will, is an answer to the objection after twenty years, why will it not be an answer after any other time? There would be no stopping." This opinion Matthews thinks has put to rest the doubts on that subject. If any such ever existed in this country, they have long since been settled.

Enough, and perhaps more than enough, has been said to shew, there is no such trust relation between mortgagor and mortgagee, as will prevent the latter from being protected by lapse of time, and that it does, *per se*, constitute a distinct substantive bar, either from the operation of the statute, *ex proprio vigore*, upon suits in equity, or by a rule of court which uniformly adopts such statutes as soon as passed. It is true, there is such a consistency between the possession of mortgagee and the right of the mortgagor, before payment of the mortgage debt, though no trust, as ordinarily presents the absence of such adversary possession as is requisite to make the statute run. And this it is, that prevents the mortgagor from being barred of his equity of redemption in a slave, after five years possession of the slave, the debt unpaid. The true reason of the bar after twenty years, is to be found in the general rule of equity, founded on analogy to the limitation of the right of entry, which bars every equitable demand, except express trusts, after twenty years. As stated by Lord Redesdale, in *Hovenden vs. Annesley*, 2 Sch. and Lef. 607, every new right of action in equity, whatever "it may be, must be acted upon at the utmost within twenty years. If a mortgagee has been in possession for a great length of time, but has acknow-

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ledged that his possession was as mortgagee, and therefore liable to redemption, a right of action accrues on that acknowledgment. But if not pursued within twenty years, the statute may be pleaded; and so in every case of equitable title, (*not being the case of a trustee, where possession is consistent with the title of the claimant,*) it must be pursued within twenty years."

After the payment of the mortgage debt, there is no longer any consistency between the possession of the mortgagee and the right of the mortgagor; and there being no such trust between them as prevents the statute from operating, it commences running, and must constitute a bar whenever the same right, if it had been a legal one, would have been barred at law. Thus in the cases of Welch mortgages, there is in the general no prescription to the right of redemption; yet it is held that twenty years possession by mortgagee, after payment of the debt, will bar a bill for redemption of such mortgage. *Cov'ty's Pow.* 377-380. So where a conveyance of real estate was made to a creditor, until he received his debt out of the rents, though it was held, the statute would not commence running until the debt was paid, yet the creditor having retained the possession for more than twenty years after payment of the debt, redemption was refused. *Yates vs. Hambly*, 2 Atk. 360. And so here, as the action at law for the recovery of the slave, would be barred in five years, if Fenwick's right were a legal one, his equity of redemption must be barred by the same time, he not having brought his suit within five years of the period when the debt became extinguished, and Macey's possession thereby rendered inconsistent and adversary.

No just exception can be taken to the adoption of five years as the term for redeeming these slaves, because the mortgage or other instrument evidencing the right, is a deed, or in the nature of a specialty. That circumstance weighs nothing in an action at law, in answer to a plea of the statute; neither should it weigh any thing here. The suit in both courts is substantially for the specific thing, and the same limitation is justly applicable to

each, no matter how the claimant's title is derived, whether by deed, or by parol.

For these reasons, I dissent from so much of the decision of the court as allows redemption of the woman and her children.

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**CHIEF JUSTICE ROBERTSON:**—The character of the thing mortgaged, whether it be a slave, or land, cannot affect the dignity of the mortgage itself. The equity of redemption, being a right exclusively within the cognisance of the chancellor, does not come within the operation of any statutory limitation. But policy and justice require that all equitable claims should be asserted in a reasonable and convenient time. Twenty years have been designated by chancery practice, as the proper time within which rights purely equitable should be asserted, and beyond which the chancellor should not, generally, hear an application for relief. In *Hovenden vs. Lord Annesley*, 2 Sch. and Lef. 637, Lord Redesdale said, that, "*every new right of action in equity, that accrues to the party, must be acted upon, at the utmost, within twenty years.*" This must be understood with the implied qualification that there has been no intermediate disability, or recognition.

CH. JUS. ROBERTSON'S Opinion.

Equitable claims should, in general, be asserted within twenty years from the time when the right accrued. But particular considerations, as a recognition of the right, disability of the claimant &c. may constitute exceptions to the general rule.

A mortgagor, or mortgagee, in possession under the mortgage, holds as mortgagor, or mortgagee, and not adversely the one to the other. As long as he so holds, the statute of limitations does not, even as to the legal right, commence running; and it will not commence at law until the amicable possession shall have become adverse. But, if either the mortgagor, or mortgagee, be permitted to remain in possession for twenty years, without any recognition, express or implied, of the existence of the debt, there should, afterwards, be no eviction, foreclosure, or redemption, against the will of the party so continuing in possession. The law will not presume that such a possession, thus long continued, had been amicable; but will consider it, after the end of twenty years, to have been adverse from the beginning,

The possession of a mortgagor, or mortgagee, being amicable, the statute of limitations does not affect the right of either, in equity, or at law. But if the character of the possession be changed from amicable to adverse, the statute then begins to run.

And after 20 years, the claim of either party will be presumed—where nothing appears to

rebut the presumption—to have been extinguished, the possession to have been adverse from the beginning, and the right of redemption barred by lapse of time.

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or from the time when the mortgage debt was due, unless some opposing facts satisfactorily appear. The payment of the debt will be presumed; and nothing appearing to the contrary, the presumption will be, that it was paid when it became due, and that, of course, the possession, from that time, was adverse, and not in the character of mortgagor, or mortgagee. Hence, if the mortgagee bring an ejectment against the mortgagor after such unqualified possession for twenty years, the statute of limitations may bar the action; and, if he filed his bill to foreclose, he may be barred, not only in analogy to the statute of limitations, but because his claim has become too stale and questionable to justify an enforcement of it in equity. The same principles apply to the mortgagor's equity of redemption, after a continued possession by the mortgagee for twenty years. But if, within the twenty years, there shall have been any acknowledgment of the subsistence of the debt, or of a holding under the mortgage, the lapse of time may not operate as a bar, at law, or in equity.

The right of the mortgagor, or mortgagee, of a slave, will not be barred by the lapse of time, short of twenty years, unless it is clearly shewn (*infra* § 61) that the holding of the party in possession had become adverse as to the other party: when the character of the possession is thus changed, the statute begins to run, and bars the right in five years.

If a slave be mortgaged, less than twenty years will not bar the equity of the mortgagor, or the right of the mortgagee, unless the party in possession shall have shewn clearly, that he had disclaimed holding under the mortgage, and had held independently of it, and adversely to the right of the other party to it. In less than twenty years, neither law, nor equity, will presume a transmutation of the possession from its original and amicable, into an inconsistent and hostile, nature. The right to redeem a mortgaged slave is precisely the same as the equity of redemption in land. It is the creature of equity, and is nothing but an equity; and, therefore, the statute of limitations does not apply to it; but the right to redeem may continue for twenty years, to exist; and indeed, facts may have intervened, which may extend it beyond twenty years, just as if the thing mortgaged had been land. But as soon as the mortgagee shall renounce his mortgage, and assert an absolute and indefeasible right to the slave, independently of the mortgage, the relation of mortgagor and mortgagee will cease to exist, and the statute of limitations will, of course, *eo instanti*, commence

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running : and consequently, such an adversary holding, for five years, would bar a legal remedy for restitution, and should equally bar the equity of redemption ; for, in such a case, the equitable right would correspond with a legal right, and the five years adversary possession would have vested the title absolutely in the holder. It was said by Lord Redesdale's successor, when speaking on the effect of the legal limitation applicable in such a case in equity, that "the court of chancery, for the peace of families and to quiet titles, was bound to adopt it in cases where the equitable and legal title so far corresponded, that *the only difference between them was, that the one must be enforced in a court of equity and the other in a court of law.*" Now, when the mortgagee is in possession as mortgagee merely, his possession is not adverse, and, within twenty years, will not be so deemed from the simple lapse of time ; and therefore, were the right of the mortgagor as legal as it is equitable, the statute of limitations would not bar his legal remedy. But, as the mortgage will be disconnected from the possession the instant the latter becomes adverse to the right of the mortgagor, and as the mortgage cannot, afterwards, have any influence on the character, or effect of the possession, the statute of limitations will commence running from the moment when the attitude of the parties was changed ; and, as five years adverse possession of a slave may vest the title absolutely in the possessor, the mortgagor cannot redeem after an adverse possession of five years ; because such a possession will have destroyed all his right, equitable as well as legal. But *as long* as the possessor holds as mortgagee, the mortgagor may redeem, because there had been no adverse possession. And, as already suggested, the possession of a mortgagee will not be deemed to have been hostile to the right of the mortgagor until it shall have continued so long that the payment of the debt, and a consequent waiver or release of the equity of redemption, may be presumed, or until the chancellor must say, according to the general rule of equity, that the application for relief is too late, and the claim *too stale*. In the great case of *Clinton vs. Chelmondeley*, reported in 2 *Merivale*, a mortgagor was

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permitted to redeem after the mortgagee had been in possession more than twenty years, because the subsistence of the mortgage had been recognised within that time; and the master of the Rolls said that the "possession of twenty years was not in the character of the owner of the legal estate, nor under any claim of being so entitled." As said in *Kane vs. Bloodgood*, 7 John. Chy. Rep. "mere possession is not, even at law, sufficient to bar the claim of the true owner. There must be something tantamount to a disseizin." This is true, with the implied qualification, that the possession has not been continued for twenty years, and under such circumstances as will create a presumption that it has been adverse during the twenty years, or as will bar relief in a court of equity; and that is the only qualification. I have seen no case, I have heard of none, in which a distinction has been taken between the right to redeem a slave, and that of redeeming land; and I can perceive no reason for any distinction, unless the possession has been strictly and clearly adverse; and then the statute of limitations applies.

Facts conducing to prove that the holding of the mortgagee, in this case, was not adverse

Fenwick, the mortgagor, retained the continued possession of two of the three mortgaged slaves, until within less than five years before the institution of this suit to redeem; and Macey, though in the possession of the female slave ever since 1809, frequently said, between that time and 1816, "that Mr. Fenwick *always* should have the right to redeem his negroes, and that, although he had taken the girl away, she should come back at any time in the world." He said, before he took possession of the girl, that "as long as Fenwick would pay the sum of two hundred and fifty dollars a year, he *never* would take possession" of the slaves. In 1816, Macey and Fenwick "*disputed*" about their accounts—Fenwick insisting that Macey was largely indebted to him, and demanding a settlement, and Macey contending that Fenwick *still* was considerably in arrear with him, and "*evading*" a settlement; and one witness proves, that "*this disputing continued*" until 1819. Another witness proves, that, in 1818, Fenwick demanded a settlement, and proposed that General Hardin (Macey's own lawyer) should



make the settlement ; and Macey said that *Major Brock might make the settlement.*

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The acts of a mortgagor, or mortgagee, in possession, to have the effect of converting the amicable, into an adverse, independent holding, should be direct, unequivocal and overt.

These facts shew satisfactorily, that Macey had made no settlement with Fenwick ; and should be deemed to have held the female slave as late as the year 1819, not in his own right, but as mortgagee. He had never renounced the mortgage, or mortgage debt, or asserted an absolute and indefeasible title to any of the slaves. Perhaps as early as sometime in 1817, Fenwick, had there been a fair settlement, might have been found not indebted to Macey. But Macey *did not admit that his debt was paid, and evaded a settlement.* I cannot infer, that Macey had admitted, or understood, that the mortgage had been discharged, nor that he did *any* thing which proved that he had renounced the original contract, or held the slaves adversely to Fenwick, or independently of the mortgage. There was certainly *nothing tantamount to a disseizin.*" After holding as a mortgagee, strong and clear proof of a "disseizin," should be required. It will not be *presumed* ; nor should it be inferred, without some direct, unequivocal, overt act, inconsistent with the original, and long continued, and often admitted, possession as mortgagee.

The contract was indisputably a mortgage ; and Macey's conduct and declarations, for years, prove undeniably, that *he so considered it, or ought to have so considered it.* He did not say, that Fenwick *might, ex gratia, redeem* ; but he frequently said he should *continue* to have the "*right*" to redeem—thus recognising the subsistence of a mortgage and of a resulting equity of redemption.

The fact that the debt had been actually paid more than five years before the institution of the suit, did not convert Macey's possession from amicable to hostile ; and should not be so construed, unless he had known and admitted, that the whole debt had been extinguished ; and it is evident that he had never so admitted.

I think that the right to redeem the woman and her children, is as clear as is the just claim to redeem the two men slaves. If Macey claimed any of them as his own absolute property, he claimed them all in the same way. Fenwick paid hire for the men annually ; his

Where the debt is, in fact, wholly paid, if the mortgagee still claim a balance, he should be deemed still to hold as mortgagee.

Other facts, indicating the character of the mortgagee's possession, in this case.

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possession was admitted to be Macey's possession; Macey repeatedly said, that he would take all the slaves from Fenwick whenever he should cease to pay punctually the two hundred dollars annual hire. It is evident, that the hire was regularly paid, and that Macey and Fenwick both understood, that, as long as it continued to be thus paid, the right of redemption should continue, as to all the slaves. There is no ground for discrimination. There is no evidence, that Macey ever bought the woman, or claimed her otherwise than as he claimed the men. Even the answer itself makes no such pretence; but treats all the slaves as standing precisely on the same ground.

If the redemption should now operate inconveniently to Macey's representatives, it will only afford to Fenwick some retribution, though late and incomplete, for the dedication of his estate and his service to Macey, during many years, for the loan of about nineteen hundred dollars. He did not sue for a redemption sooner, because he was lulled by Macey. If Macey had desired to secure himself from loss, or hazard resulting from time, he ought to have filed his bill for foreclosure; and he ought to have acceded to Fenwick's overtures for a settlement, and not have evaded them, as he did. It is not too late to do justice; and no principle of equity or authority of law will be violated, or disregarded, by the decree now to be rendered.

Concurring with my associates in much of the view taken by each upon the effect of time, but with neither of them in all their illustrations, I have very hastily and imperfectly presented the principles of my own opinion.

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CHANCERY.

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97 673Simpson and Others *against* Hawkins  
and Cochran.[Mr. Monroe and Mr. Triplett for Plaintiffs : Mr. Crittenden and Mr. Hag-  
gin for Defendants.]

FROM THE CIRCUIT COURT FOR GALLATIN COUNTY.

This cause was first argued at the Fall Term, 1831, while the Court was composed of Chief Justice Robertson, Judges Underwood and Buckner. Soon after the close of the term, and while the cause was under advisement, Judge Buckner resigned, and was succeeded by Judge Nicholas ; who, as he was not upon the bench at the time of the argument, had taken no part in the decision, when the following Opinion was delivered, by Judge Underwood—April 11th, 1832. The cause was afterwards reargued before the present Judges, and their Opinions delivered *seriatim*, as will be seen in the sequel.

In August, 1818, the Simpsons executed a deed purporting to convey to Hawkins and Cochran, five hundred and thirty acres of land ; two hundred and fifty of which they held, according to the deed, under the claim of Howard, and the remaining two hundred and eighty acres under a deed executed by William Steele, as attorney in fact for John Adams, to them. The deed from the Simpsons to Hawkins and Cochran, contains a clause of general warranty.

A statement of the facts of the case, and of the proceedings and decree in the court below.

Hawkins and Cochran purchased the land at fifteen dollars per acre ; paid a large sum in hand, and gave their notes for the balance. Judgments were obtained on some of these notes ; to restrain the collection of which Hawkins &c. filed their bill. An injunction was awarded. The equity relied on consists in an alleged defect of title, and an inability on the part of the plaintiffs in error, to remunerate the defendants, in case the land should be taken from them after the payment of the money.

The court rescinded the contract, and decreed that the Simpsons should repay the purchase money received by them, with interest ; and likewise pay for the lasting and valuable improvements made upon the premises since

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the sale, subject to deductions for rent and waste. The writ of error is prosecuted to reverse this decree.

Commissioners were appointed to settle the accounts. They reported a large balance against the Simpsons. The report was confirmed by the court ; and a final decree entered, authorizing the defendants to hold possession of the lands until the money was paid, and providing for a sale of the land, if the money was not paid by a given day, and appointing a commissioner to carry the decree into effect by making the sale upon the nonpayment of the money. The commissioner was left to decide whether the money was paid on the day or not. He made sale of the land, at public auction, on the 8th of December, 1828 ; having first caused the land to be valued, as though the sale has been conducted under a *feri facias*. Rigg purchased it, at the price of one hundred dollars. The commissioner reported his proceedings to court ; they were confirmed ; and after crediting the hundred dollars made by the sale, a balance was found against the plaintiffs in error, amounting to three thousand four hundred and twenty nine dollars, forty seven and a half cents ; which the court directed them to pay, with interest at the rate of six per centum per annum, from the 11th of August, 1818, together with all costs ; and authorized execution to issue therefor. After this, an execution was taken out, upon the decree, and levied on the equity of redemption, which the plaintiffs in error claimed in the land. Their equity of redemption was sold for one hundred dollars, and purchased by Rigg.

It seems from the evidence in the cause, that the Simpsons, or one of them, settled on that part of the land covered by the claim of Howard, as far back as February, 1796. So that there was more than twenty years continued possession, from the date of that settlement up to the time possession was delivered to Hawkins and Cochran. The possession of the Simpsons during that period, within the limits of Howard's claim, was adverse to the claim of Adams, of twenty thousand acres. It does not appear, that a writ of right would avail any thing in favor of the representatives of Adams. An action of ejectment could not dispossess the Simpsons, or their

vendees, to the extent of the two hundred and fifty acres held by them under Howard's claim.

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Regarding the protection which time had thrown around the Simpsons, perceiving no actual fraud on their part in the contract with Hawkins and Cochran, and seeing that the contract, has been fully executed by a formal conveyance, with warranty of title against all the world, which warranty has not been broken by an eviction from the premises, and for ought that appears to us, never will be, we cannot concur with the circuit court in a total rescission of the contract.

Indeed, where contracts are executed by conveyances, we are of opinion, that there can be no rescission of a contract in any case, unless it has been tainted by actual fraud. If the warranty of title has been broken, so as to entitle the vendee to damages, or if the vendee be entitled to damages upon a covenant of seizin, he may apply to the chancellor, where the vendor is insolvent, to set-off those damages against the unpaid portion of the purchase money. The ground upon which the chancellor interferes in such cases, is the prevention of the irreparable mischief which otherwise might result from the insolvency. He ought not to act upon the principle of rescinding the contract. On the contrary, he should affirm the contract, and secure to the party such damages as he might be entitled to, for a partial or total violation thereof by the obligor. If a deed of conveyance be executed, for any quantity of land, and the vendee is put into possession thereafter, in case he loses half or three fourths of the land, the law only authorizes a recovery, upon the warranty, of damages commensurate with the loss. The chancellor must follow the law, and not lay hold of such a partial loss, and require the vendor to take back the portion of the land saved, and return the purchase money for that, under the idea of *rescinding contracts*.

A contract for the sale of land, unaffected by fraud, cannot be rescinded, in chancery, after it has been carried into effect by a conveyance. [See the dissent of Judge Nicholas, *post*.]

If the grantee is entitled to damages for a breach of warranty, or of a covenant of seizin, and the grantor *insolvent*, the grantee may obtain an injunction to restrain the collection of any unpaid portion of the purchase money, and finally have it set off against the damages. See further on this point, at p. 309, and the concurrent opinion of Judge Nicholas, *post*.

The fact, that Howard's claims were not carried into grant at the date of the deed from the Simpsons to Hawkins, may recover, on the warranty, damages commensurate with the loss : but it is not cause for rescinding the whole contract.

If the grantee in possession loses part of the land, but it is not

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Twenty years  
adverse posses-  
sion may be re-  
lied on, without  
a grant or con-  
veyance.

A covenant of  
warranty is not  
broken until an  
eviction has tak-  
en place.

An administra-  
tor, with the  
will annexed,  
may exercise all  
the powers in-  
tended to be  
conferred on the  
executor by the  
will.

But administra-  
tion, with the  
will annexed,  
granted in an-  
other state, does  
not authorize  
such adm'r to  
convey land in  
this state, un-  
less he is also,  
appointed by the  
proper ct. here:  
his deed would  
pass no title.—  
See the opin-  
ions of the Ch.  
Jus. and Judge  
Nicholas, (both  
concurring) post.

kins and Cochran, cannot operate against the foregoing view of the subject. It is enough that the Simpsons, or one of them, entered upon the land claiming the same adversely to Adams, whose title, now, is the cause of alarm to the defendants in error.

It is not necessary that the possessor of land should claim under a patent, in order to avail himself of the limitation founded on twenty years continued, adverse possession. The surveys of Howard were made as early as 1792. This fact, connected with other circumstances, justifies the inference, that the Simpsons entered upon and claimed a particular quantity, susceptible of identification by a marked boundary. It does not appear, but that Howard's claims may yet be carried into grant. They may be saved from forfeiture by the disabilities provided for in the statute. But, however these things may be, it is certain that the covenant of warranty made by the Simpsons, has not been broken; and for any thing appearing to us, it is not probable that it ever will be, so far as it relates to the two hundred and fifty acres claimed under Howard by the Simpsons; to that extent; therefore, the decree cannot be sustained.

In relation to the two hundred and eighty acres conveyed to Hawkins and Cochran, we have experienced more difficulty. This parcel the Simpsons claimed under a deed executed in the name of John Adams, administrator, with the will annexed, of Richard Adams, by William Steele, his attorney in fact. We are of opinion that this deed confers no title upon the Simpsons. Conceding that the administrator with the will annexed, may do all which the executor refusing to qualify might have performed upon his qualifying, under the authority conferred by the act of 1810, (4 *Littell's Laws*, 204,) as was determined by this court in the case of *Jackson vs. Jeffries*, 1 Mar. 88, still we apprehend that the person appointed administrator, with the will annexed, in another state, where the testator died, and where his will may have been first recorded, cannot exercise the power and fulfil the duties contemplated by the act of 1810, in relation to real estate situated in Kentucky, unless he shall be appointed by the proper court in this state. In-

deed, we look upon the case of *Jackson vs. Jeffries*, as settling the point. In that case, as may be seen by the petition for a rehearing, it was contended that the appointment of an administrator, with the will annexed, in Virginia, conferred on the administrator so appointed the power to sell and convey, under the act of 1810, if the true construction of that act conferred any such authority upon an administrator in any case; and consequently, that the acts of the subsequently appointed administrator, with the will annexed, in Kentucky, were void. This idea was rejected by the court, and the acts of the administrator appointed in this state supported. Two points seem to have been settled in that case: *first*, that executors must obtain from the proper court in this state, letters testamentary, before they can administer the estate situated here, in cases where the will was made and admitted to record in another country; and *second*, that executors by taking upon themselves the administration of the will in a foreign country, do not preclude the courts of this state from granting administration, with the will annexed, with a view to reach the property situated here. It is a settled fundamental doctrine, that the lands of every state can only pass from one to another according to the laws of the state where they are situated. It results that an administrator, with the will annexed, to be able to sell lands situated in Kentucky, must receive his appointment from a court in this state. Now the will of Richard Adams does not appear to have been recorded in any office of this state; nor does it appear that any court of this state ever appointed an administrator, with the will annexed. John Adams received his appointment, as administrator, from a court in Virginia, in the year 1800, after all the executors named in the will had refused to qualify. Without enquiring into the extent and validity of the power of William Steele, as derived from John Adams, we have reached the conclusion, that the deed executed in the name of Adams, by Steele, conferred no title on the Simpsons; because Adams was not appointed administrator, with the will annexed, by the proper tribunal in this state.

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If land be sold, without fraud or misrepresentation, the conveyance executed, and the vendee in possession, and it afterwards turns out that the vendor was in fact destitute of title: yet while the vendee remains in undisturbed possession of the land, he cannot have a rescission for the failure of title. [Judge Nicholas of a different opinion, *post.*]

As to the two hundred and eighty acres of land, therefore, sold by the Simpsons to Hawkins and Cochran, they have no title whatever; and inasmuch as the Simpsons and those claiming under them, have not had twenty years continued adverse possession, the representatives of Richard Adams, deceased, who is recognised on all sides, as the original proprietor, have it in their power to evict Hawkins and Cochran, their heirs, and vendees, from the said two hundred and eighty acres of land. But as yet no eviction has taken place, and the question arises, whether a possibility, or even a probability, that an eviction will hereafter take place, coupled with the insolvency of the Simpsons, is sufficient to justify the defendants in error in withholding the payment of the balance of the purchase money. We think it is not. The decisions of courts ought to be based upon such a degree of certainty as that the mind of a just judge should be able to rest satisfied with the sentence. No judge can repose with confidence and rest his opinions upon the events of futurity. Events which have transpired, and not those to come, are, in the general, the sole and exclusive subjects for the judiciary to act upon. The chancellor, by way of exception, may anticipate, and in some cases apply a preventive justice; but cases of this character must be such as will leave the decree rendered, upon a permanent foundation; where its justice will not be influenced by the happening of future events, the one way or the other. The chancellor will, on fit occasions, undertake to control futurity, by decreeing that certain things shall not be done. Now, it is impossible for us to say, that Richard Adams' representatives will hereafter evict the defendants in error from the two hundred and eighty acres of land. They may never institute a suit, or they may postpone suing until the title of the defendants may be protected by time. If this should be the course of things, it is clear that the covenant of warranty, entered into by the plaintiffs, will never be broken, and that the defendants will sustain no injury. Yet, in this case, where, to say the least, there is a possibility that the covenant may never be violated, a covenant entered into with good faith, and without the least intention to de-



fraud, the court has undertaken to annul, and thereby to destroy an executed contract. It is going unwarrantable lengths, in our opinion. The consequence, in this particular case, has been, first, a declaration on the part of the court, that the Simpsons had no title to the estate; and finally, a decree to sell whatever title they might have, to satisfy the sums awarded against them. It is not surprising, under these circumstances, that an estate which sold for near eight thousand dollars, should be sacrificed for two hundred dollars.

If the defendants had fears growing out of the insolvency of the Simpsons, and the situation of the title to the lands sold them, it might have been proper to apply to the chancellor to have those fears quieted. With that view they should have made the owners of the adverse claims parties, and called on them either to assert, or relinquish, their claims. With these parties before the court, it would have put the future under the control of the chancellor, and laid such a foundation for a decree, as that its justice could not have been changed by any subsequent event.

The representatives of Richard Adams were made defendants, in the first instance; but by consent of both sides, they were not brought before the court, and the cause progressed to trial without their being parties. If they had been parties, and succeeded in asserting a better right to the two hundred and eighty acres, than that transferred by the Simpsons to Hawkins and Cochran, then the decree might have regarded Hawkins and Cochran same as in the situation, in respect to the two hundred and eighty acres, as they would have been in, had they been evicted by action of ejectment; and it might then have been proper to grant relief. The failure to bring the representatives of Adams before the court, is fatal to the equity claimed or asserted in the bill.

It should not be overlooked, that the defendants in error, as complainants, seeking relief against an executed contract, upon a warranty of title which had not been broken, were bound to do every thing necessary to make out the grounds upon which the chancellor could safely interpose in their behalf. For any thing that we know,

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But, he may file his bill *quia timet*, bring the parties before the court from whom he apprehends danger, to assert or relinquish their rights, and have the whole controversy settled by the decree. And, if the vendor is insolvent, the collection of the purchase money may be suspended, in the mean time, by injunction.

Without those parties—which it is the duty of the complainant to bring before the court—there can be no relief. [See the opinions of the Ch. Justice (concurrent) and Judge Nicholas (dissentient,) *post.*]

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the representatives of Adams may have insisted on affirming the contract and conveyance, made in the name of John Adams, as administrator, with the will annexed, by Steele as his attorney in fact. In that event, there could be no pretext for rescinding the contract between the plaintiffs and defendants.

The cases of *Rawlins &c. vs. Trimberlake*, 6 Mon. 225, and *Payne vs. Cabell*, 7 Mon. 198, sustain, we think, the principles of the foregoing opinion.

We are, therefore, of opinion, that the decree is altogether erroneous, and that the circuit court ought to have dismissed the bill, without prejudice, because of the failure of the complainants to bring the proper parties before the court.

The relief granted by the court, is, we think, to say the least, premature. If granted at all in this case, it should be when it is shewn that the defendants have suffered an eviction, or what shall be equivalent thereto. We think, that in cases like this, where the vendors are alleged to be insolvent, and there are just grounds for fearing an eviction, the chancellor may interpose, and suspend the payment of the purchase money, although the vendor has executed the contract on his part by a conveyance. But whenever he does, if there has been no eviction at law, we regard it as indispensable, that all parties interested should be brought before the court; when the chancellor should settle their respective rights; and if in doing this, he finds it necessary to take the land from the vendee of the insolvent vendor, then he may secure the vendee, by setting off the damages occasioned by the loss of the land, against so much of the unpaid purchase money. This cause was not prepared under this view of the law.

The decree of the circuit court is reversed, and the cause remanded; when the circuit court will either dismiss the bill, without prejudice, and dissolve the injunction, with damages; or suffer the complainants to take steps to bring the proper parties before the court, as in its discretion, may best comport with the justice of the cause. The administrator of Hawkins is his proper representative, so far as the personalty is concerned, and

should be a party to the suit, if leave is given to make the proper parties. If leave is given to make the proper parties, the court will then take such other steps as may be necessary to bring the cause to trial on its merits.

The plaintiffs in error must recover their costs.

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BEFORE the close of the term at which the foregoing Opinion and Decision were rendered, they were *suspended* by order of court, and a reargument directed—to take place at the ensuing term. At the last Fall Term, the cause was again argued at the bar, very elaborately, before the present Judges. Upon the final decision, at this term, the general principles of the former opinion again received the sanction of the court—Judge Nicholas dissenting upon the most material question. The views of the Judges respectively, will be seen by their separate Opinions which follow.

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JUDGE UNDERWOOD :—Since the reargument of this cause, I have given to it that attention which its importance to the parties litigant, and its effects in settling principles of law, required. The discussion which the subject has undergone, both at the bar and by the members of the court, has confirmed me in the belief that the opinion originally delivered, is correct.

As the record stands, Hawkins and Cochran have sustained no injury, and the Simpsons have not violated their covenant.

It is the apprehension of future injury, therefore, which constitutes the basis of the bill.

It is the power which authorizes the chancellor to secure a party against future loss, that justifies him in taking cognisance of cases like this. Such power should never be exercised to the oppression and ruin of defendants. Its limit should be the protection of the complainant against the apprehended danger or loss. In this case, it has not been used as a shield to save Hawkins and Cochran merely, but it has been employed as an instrument of destruction to the Simpsons. The original opinion exhibits my views as to the proper manner in which this extraordinary power of the chancellor should be used as a shield. I should deem it useless to add any thing to that opinion, but for a new attitude which this case may assume after its return to the circuit court.

The power of the chancellor to protect a party from apprehended loss (on a bill *quia timet*) should never be so used as to oppress, or injure, another party.

*Ante*, p. 303.

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The original opinion requires, that the complainants should shew, before they were entitled to relief, "an *eviction, or what shall be equivalent thereto.*" In other words, they must repose upon the warranty in the deed which they have accepted, until they shew a loss of the land by eviction under a paramount title, or that there exists a paramount title, which can and will be successfully asserted against them. And for this purpose, they are required to bring the holders of such adverse claims as they fear, before the court, and compel them either to relinquish, or assert, their claims, so that the power of the chancellor may be safely exercised. I regard it as immaterial whether the vendors had any title at all. If they conveyed with warranty, and put the vendee in possession, I hold that there can be no rescission of the contract where there has been no fraud, no eviction, and no assertion of an adverse claim.

Upon a bill *quia timet*, if a party from whose title danger is apprehended, be a nonresident, to whom he having failed to appear—the right to open the decree at any time within 7 years, is reserved, the vendor may be required to give security to indemnify the vendee against loss, or he may be restrained from collecting the purchase money till the expiration of the 7 years.

The new aspect in which the case may present itself hereafter, is this : Suppose the heirs of Adams are non-residents, and consequently cannot be brought before the court to litigate their title, except by a constructive service of process : to wit, publication made against them. Suppose, under such publication, the court should decree a relinquishment of their title, in order to quiet the fears of the complainants. Then, as such decree is liable to be opened at any time within seven years—if it should be done, and the heirs of Adams successfully assert their claim, and deprive the complainants of the land, what will be the consequence if, in the mean time, they have paid the purchase money to their insolvent vendors ? The consequence would be inevitable loss, under such a state of things. It is to prevent such consequences, that the power of the chancellor must be put forth. How shall it be done ? I answer in one of two ways, either by enjoining the collection of the purchase money until the seven years have run, and the decree has thereby become confirmed, or by permitting the vendors to give security, such as the court shall approve, to indemnify the vendees for paying over the money. In such a state of things, one or the other of these courses should be taken. If the vendors cannot give the security required,

the other course is safe; and the vendees cannot in that event complain, because they have, or might but for their fault, have had the use of the land.

It may be asked, what is to be done, if one or more of the heirs of Adams are infants, and time should be reserved for them to open the decree taken against them, until six months after their arrival at full age? I would give the same answer. Either suspend the collection of the judgments, or require the indemnity. It seems to me that such an exercise of the power of the chancellor will do full justice to all parties.

But if he be permitted to enquire, whether the deed with warranty passed a valid title, and if he does not find it entirely unexceptionable, then to cancel the contract, merely because the grantor is insolvent, it would, in my opinion, be tolerating a power to do mischief, and to aggravate the calamities which befall the poor. If there be fraud, there may be some foundation for such a doctrine. But if good faith and fair dealing has marked the conduct of the man who has since become insolvent, I can never consent to deprive him of the advantages of an honest bargain, merely on account of his poverty. There is no fraud charged against the Simpsons, and it is evident to my mind, from the whole record, that they acted in good faith.

As to the dismissal of the bill against Adams' heirs, by consent of the Simpsons, as well as the complainants, and waiving the necessity of bringing them before the court, I think it cannot operate against the rights of either party. It only proves that they have consented to an entry on the record, and acted in pursuance to it, so as to defeat the object both parties had in view. Now they are better advised, and an opportunity afforded them to correct the error.

What good will it do to make the heirs of Adams parties, when the land has been sold under the decree of the court? Can they get possession if made parties, and

a decree has been rendered, and the land sold under the decree, which is afterwards reversed, and remanded, with leave to make new parties, who are alleged to hold a paramount title, the latter may, by cross bill, make the purchaser under the decree a defendant, have the whole matter settled, and obtain the possession. [See the concurrent opinion of the Chief Justice, and the dissent of Judge Nicholas, *post*.]

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A similar course may be pursued where the titles of infants are feared.

By agreement of the parties in court, the necessity of making other indispensable parties, was waived: held that the agreement ought not to prejudice those by whom it was providently made.

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they should establish the best right ? I have no difficulty in answering these questions. The immediate benefit conferred by making them parties, is, that it will enable the court to settle the rights of all concerned, upon a solid foundation. They can obtain the possession, in this suit, in case they can establish the better right. Although they might have a complete remedy at law, still, if they are brought into chancery to litigate their right, they may make their answer a cross bill, and have complete justice done them. And to that end, they might make the person who purchased the land under the order of sale, a defendant. Such purchaser can occupy no better situation than the original litigants, and coming in under them may properly be reached by the chancellor, whenever it is necessary, to do complete justice.

DISSENT OF  
JUDGE NICHOLAS.

Statement of the  
case.

JUDGE NICHOLAS :—In August, 1818, the Simpsons sold and conveyed by deed, with covenant of general warranty, to Hawkins and Cochran, a tract of land, containing five hundred and thirty acres, at the price of fifteen dollars per acre : the deed reciting that it “embraced two hundred and fifty acres under Howard’s claim, and two hundred and eighty acres conveyed by deed from William Steele, attorney in fact for John Adams, to the Simpsons.”

Hawkins and Cochran, having paid four thousand six hundred and seventy five dollars of the purchase money—in April, 1820, filed their bill, enjoining the collection of the balance, and praying a rescission of their contract of purchase from the Simpsons, on the ground that they had bought the land for the purpose of laying off a town upon it, trusting to the representations of the Simpsons, that they had a perfect title to the land : whereas, it had recently been discovered, that they had no title to two hundred and eighty acres of the tract.

The Simpsons answered, and without denying their representations of the goodness of their title, insisted that their title to the two hundred and eighty acres was good and perfect ; that they derived title thereto by deed of conveyance from William Steele, attorney in fact of John Adams, administrator, with the will annexed, of

Richard Adams, deceased, who was the patentee of the land.

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In April, 1821, Hawkins and Cochran, by an amended bill, charged the Simpsons to be insolvent; that the two hundred and fifty acres, residue of their purchase, was also covered by the patent to Richard Adams, and that the Simpsons had no title to that part either.

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The Simpsons answer, that one of them settled on the two hundred and fifty acres in 1796, and had continued possession ever since; that he originally settled by virtue of a bond from one Howard, whose claim was better than that of Adams, and, in 1818, had obtained a deed therefor from a Mrs. Ivy and her husband, she being the heir of Howard.

After two trips to this court, the cause came on for final hearing in 1828, the parties waiving, on the record, all objections on the ground that the heirs of Adams had not been brought before the court; and the circuit court decreed a rescission of the contract; a restoration of the purchase money paid by Hawkins and Cochran, and ordered the land to be sold therefor. The Simpsons not having appealed, or superseded this decree, the land was sold by a commissioner, under the decree, and one Rigg became the purchaser, for the sum of one hundred dollars, with one of the Simpsons as his surety in the note; and this sale was afterwards confirmed.

Decree of the  
court below, and  
sale of the land.

It is abundantly established, that the Simpsons are insolvent. The utmost value that can be put upon the whole five hundred and thirty acres, according to the proof, now, or at the time of sale, is not more than four thousand dollars; though Hawkins and Cochran agreed to pay seven thousand nine hundred and fifty dollars, and have actually paid four thousand six hundred and seventy five dollars therefor. There is good reason, therefore, for believing, from the exorbitant price paid, and agreed to be paid—the uncontested allegations of Hawkins and Cochran, that they were ignorant at the time of the purchase, of any defect in the title, and that they trusted to the representations of the Simpsons, that they had title.

A high price paid justifies the inference that the purchaser, ignorant of any defect of title, relied on the seller's representations.

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Conveyance of  
land *here*, by a  
Virginia execu-  
tor, passes no  
title.

View. of the  
plaintiffs' claim  
to the land, by a  
conclusion that  
they were whol-  
ly destitute of  
title.

According to previous decisions, the grant in Virginia, of administration to John Adams, with the will annexed, conferred no power whatever upon him to sell land in this state; any power, therefore, from him to William Steele, for such purpose, would have been a mere nullity. But, in truth, though he did authorize him by letter merely, to sell, he never did execute any power sufficient to authorize him to convey. The sale and conveyance by Steele to the Simpsons, in 1818, did, therefore, give them no title whatever to the land.

They admit that the claim of Howard, under which they pretend to hold the two hundred and fifty acres, never has been patented, and though entered in 1783, and surveyed in 1792, the survey never was returned to the register's office until 1821, since the institution of this suit. They do not prove any bond, or other executory contract, from Howard; but exhibit a deed for the two hundred and fifty acres, from the daughter of Howard and her husband, to them, dated in 1818; but the deed never was acknowledged, nor the privy examination of the *feme* taken before any clerk, nor was it ever recorded. They do not even allege, that Howard himself ever made them any deed, or that his daughter ever made them any, other than the one exhibited. For the want of some such allegation, no presumption can be made of the execution of any such deed, even if it could otherwise have been allowed from the mere lapse of time. After eight years preparation, with a full knowledge of the necessity for proving title, they have not been able to exhibit the least shadow of title, either legal or equitable, to any part of the land sold. It is true they shew, that at the time of the decree, they had had thirty years possession of part of it, that is of the two hundred and fifty acres; but how much, of even that part, even is not proved;—for it does not appear how much of that part was enclosed, what was the date of Adams' patent, when Howard died, nor when his daughter married. But it does appear that Adams lived and died in Virginia, that his heirs are nonresidents, and that Howard's daughter must have come to full age within less than twenty years before the date of the decree. What were the terms of the alleged

The chancellor  
will not compel  
a purchaser to  
take a title bas-  
ed on mere pos-  
session.



executory contract with Howard ; what was the purchase money, and whether it has been paid, are not even alleged. A title based exclusively upon a naked thirty years possession, held under such circumstances, is not such an one as the chancellor ought to compel a purchaser either to take or acquiesce in. This part of the case need not, however, be farther dwelt upon, inasmuch as I do not understand my brethren to contend, a sufficient title has been made out.

They contend, that, from the recitals in the deed to Hawkins and Cochran, they must be presumed to have had notice of the state of the title, and by accepting a deed they elected to risk the title, and trust to the covenant of warranty. In the first place, there are no allegations on the part of the Simpsons, to admit either the presumption or proof of any such notice, in contradiction to the express denials of Hawkins and Cochran, and the strong inference to the contrary, deducible from the high price paid, and the purpose for which they made the purchase. But I do not understand the books as giving any such extensive effects to recitals in the deed. They only give notice of that which they recite. The only notice given by the recitals here, is, that the Simpsons held a part of the land under a deed from Steele, as attorney in fact for the administrator of Adams, and the balance under Howard's claim. It is no notice of the insufficiency of Steele's unrecorded power; or that the administrator had no power to sell, or that the Simpsons had no title, legal or equitable, derived from Howard. The utmost effect that could possibly be given to such recital, would be to fix them with notice of the whole chain of title to that part derived from Richard Adams. It cannot prove, that they had knowledge of the defect, or rather want of power, on the part of Steele and the administrator. The only fair presumption from the price paid, is, that they were ignorant of any such defect ; supposed the title perfect, and trusted to the representations of the Simpsons, that it was so. The Simpsons do not pretend that they made no such representations, or that the others knew of the defect of title ; on the contrary, their only reliance, in defence, is, that the

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title is perfect and complete. The most favorable aspect in which the case can possibly be viewed for the Simpsons, is, that there was a mutual ignorance and mistake as to the title. This, if it is true, is but ignorance of law on their part; but still it is mistake of a material fact—the unsoundness of the title, though it be induced by ignorance of law. It seems to me, so radical a mistake, when connected with the actual misrepresentation, should not be debarred from all relief, merely because it proceeded from ignorance of law, when it is admitted the mistake was mutual, and any other supposition makes the vendor guilty of a fraud. But taken in connection with the insolvency of the vendors, the mistake, the misrepresentation, and the want of title, constitute a state of case fully authorizing the decree of the circuit court.

Purchaser in possession under a warranty deed, may enjoin the collection of the purchase money, by the vendor who is insolvent & without title.

It is too late now, in this court, to question the doctrine, that where a vendee has received a conveyance with warranty, and been let into possession, he may nevertheless enjoin the collection of the purchase money, when the vendor becomes insolvent, and it turns out that he has no title, or that his title is defective. That doctrine has been incidentally and directly recognised in too many cases to be now shaken, even if it were originally wrong. But it is right in itself, and clearly deducible from the general principle that sustains every injunction *quia timet*. The dispute is, therefore, narrowed down to the enquiry, whether it be the duty of the vendee, in such cases, to make the holder of the title a party; compel him to assert and litigate his right with the vendor, or be barred by a decree compelling a release.

Question—whether the true owner of land can be compelled to become a party to the suit of others, who claim, & contend with each other for, the land.

There is a previous question, whether the proprietor, or title holder, can be properly coerced into such litigation, by either vendor or vendee. If A be in the possession of land belonging to B, there is no pretence for his maintaining a bill, shewing that fact, for the purpose of compelling B, either to assert his title and turn A out, or surrender it to A—the latter having no claim whatever thereto, either legal or equitable. Nor can the fact, that A innocently purchased from C, supposing he had title, alter the case. Neither would A and C both uniting in a bill against B, alter it. They could maintain no such

bill against him. Nor can the matter be altered, so far as concerns B, that A and C should have got into a dispute with each other, concerning his property, to which neither of them has any just claim whatever. Suppose, however, that B is made a party to such litigation, and he makes default : would any chancellor decree a surrender of his title to property, confessedly his, because they had wrongfully usurped the possession, or because they were disputing with each other as to the validity of a sale of it from one to the other ? The twenty ninth section of the act of 1796, 1 Dig. 221, is an enabling statute, which, for the first time, authorized the holder of both the legal title and possession of land, to quiet his possession, by bill in equity against any person setting up title thereto. Without this statute he could not have done it, but was compelled to wait until the adversary claimant chose to assert his title. With how little pretext then, can such right be claimed in behalf of one having barely the possession, without title, either legal or equitable?

But if the true proprietor can thus be compelled to litigate his title with, or surrender it to, persons having no right, whose duty is it to bring him before the court, in this case ? Strictly speaking it is the duty of neither, unless he chooses so to do. The complainants shew, that they are about to have the purchase money collected from them by their insolvent warrantors. Here their case is fully made out. The danger of the proprietors hereafter asserting their claim, and the complainants being left, after collection of the purchase money, without any adequate recourse, fully authorizes an injunction against the collection. If the defendants had defaulted, without making any answer, the injunction must have been perpetuated. If they had answered, admitting the title to be in the devisees of Adams, but saying they made no claim to the property, and never intended to assert it, would such mere naked asseveration, without proof, induce the chancellor to dissolve the injunction ? This, however, is not the ground of reliance. The defendants insist and rely that they have the title. It seems to be conceded, that the ground referred to, even if it were relied on, can only be sufficiently and satisfactorily made

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Question—as to which of two contending parties is bound to bring before the court, a third, whose title one claims under, by defective conveyance, & the other fears will be asserted against both.

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out, by bringing the devisees of Adams before the court. Now it would appear to be in the natural order of things, that he who relies on a defence, should assume the burthen of making out that defence. The presumption of peril and the actual peril to the complainants, is the same now, that it was at the institution of the suit. If the want of title was good ground for granting the injunction, it must be equally available for perpetuating it. If the bill had merely alleged, the defendants had no title, and they had admitted it, but, by way of avoidance, had said, the title was in a third person who never meant to assert it, that could not have rendered it the duty of the complainants to have amended their bill, and brought such third person before the court, to ascertain whether what the defendants had said with regard to his intention were true, or no. See *Hogan vs. McMurtry*, 5 Mon. 183.

It is said, that there is a chance, the proprietors of this land may never assert their claim, and in that event, it would be doing wrong, as between these parties, to rescind their contract. But on the other hand, is there not a chance, and a much greater one, that they will assert and enforce it? in which event, it will have been doing still greater injustice, not to have perpetuated the injunction. This chance of injustice is much the least on the side of the party in default, and they should be made to bear the burthen. Besides, there is no room for conjecture here; for it is proved, that, since the institution of the suit, one of the heirs of Adams, was in the neighborhood of the land, disavowing the validity of the sales made by Steele, asserting the claim of his father's heirs; and that the Simpsons were chaffering with him for a relinquishment of their title. In these cases, the injunction should never be dissolved until the purchaser is secured against risk from the want of title in the vendor. The vendee stands very much in the attitude he does when defendant, resisting a specific performance; and it is probably speaking within bounds, to say his injunction should never be dissolved, except under similar circumstances to those where specific performance would be enforced against him. That is, where the title is freed from all danger.

It is further said, "no judge can repose with confidence, and rest his opinions, upon the events of futurity. Events that have transpired, and not those to come, are, in the general, the sole and exclusive subjects for the judiciary to act upon." Admitting all this, still its direct application is not distinctly perceived. In granting the purchaser relief, the chancellor acts upon no undivulged or untranspired event. He restrains the collection of the purchase money because of the peril in which the purchaser would otherwise be placed, from the want or imperfection of title in the vendor. The want of title, and insolvency of the vendor, are ascertained facts; the peril to the purchaser thence ensuing is an existing evil, which the vendor is bound to remove, before he can equitably and conscientiously proceed to the collection of the purchase money. This is not acting upon a state of case that may arise, but upon one that already actually exists. It is not a remedy for breach of warranty, or any thing equivalent or similar thereto. But an act of "preventive justice," on the part of the court, the full effectuation of which, under a due attention to the interest of both parties, requires a rescission of the contract. It is a mere exception to the general rule, that after taking a conveyance, the purchaser will not be allowed to rescind for the want or defect of title. As to the uncollected purchase money, it places the purchaser in nearly the same attitude, as if the conveyance had not been executed. A perpetual injunction, or, at least, for so long as the purchaser is in danger, is what his case requires, and all that it requires. But as it would be unjust for him to withhold the purchase money, and continue the enjoyment of the land, in which there is a chance he may never be disturbed, the interest of the vendor requires the court to go a step farther, rescind the contract, and make the purchaser restore the title and possession. The right to the injunction does not depend upon any actual or virtual eviction; but proceeds from the manifest injustice it would be to permit the insolvent warrantor to collect the purchase money, whilst the purchaser was in danger of being evicted. In effectuating this right, the rescission ensues for the benefit of the warrantor himself.

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Consideration  
of the grounds  
upon which the  
chancellor in-  
terposes in fa-  
vor of the ven-  
dor, where there  
is a failure of ti-  
tle.

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Of the decree a-  
gainst heirs who  
have received  
the purchase  
money, for their  
land, sold by  
one not duly  
authorized.

It is surmised, that the proceeds of sale to the Simpsons, may have been appropriated to the benefit of the devisees of Adams; and it is thence inferred, that the chancellor might prevent them from asserting their claim. The obvious answer to which, is, that if there be any such state of case it should have been shewn, and not left to mere conjecture. If, however, the facts be conceded, it is more than doubted whether any such result would follow. The most the chancellor could do, in such case, would be, to make the devisees refund to the Simpsons, or their vendees, the amount they had received. This was only two hundred and fifty dollars, for three hundred acres of the land; which would be but poor remuneration to the purchasers here, for two hundred and eighty acres, at fifteen dollars per acre. But the chancellor cannot act upon, nor can he rightfully compel the purchasers to rely upon, any such unstable surmise of either law or fact.

It is presumable, from what appears in the record, that the devisees of Adams are non-residents, and that they will have to be brought before the court by advertisement. Suppose it be done in that way; that they make default, as it is likely they will, and that though no shadow of right be manifested for divesting them of their title to the land, yet the court decrees a surrender and release of it: would the court compel the purchasers to rest with such title, so obtained, and dissolve their injunction, when it would be in the power of the devisees, at any time within seven years, to open the decree, and set aside the whole proceeding? A doubt is intimated in *Tevis vs. Richardson*, 7 Mon. 657, whether the court should, in any case, compel a purchaser to accept a title derived through a proceeding against unknown heirs. There are still stronger reasons for not compelling him to accept it under circumstances like these, where the only ground of equity against the non-resident defendants, is, the unsustained affirmation, that they never mean to assert their right.

If the case of the defendants could have been aided by bringing the devisees of Adams before the court, it was their duty to have made them defendants, and by

appropriate allegation and prayer, have enabled the court, on final hearing, to have quieted and confirmed the title of the complainants, by proper decree. They had abundant time for so doing; and if not, it would have been granted, on application. Having failed to do it, they should abide the result of their own laches.

But there is, to my mind, an unanswerable objection to reversing the decree, because the heirs of Adams are not brought before the court, to be found in the fact, that the parties mutually waived the benefit of any such objection. The Simpsons by failing to appeal, or supersede the decree, suffered the property to be sold and purchased, under the decree, by a third person, for a mere trifle. If the doctrine of the case of *Anderson's heirs vs. Parker's heirs*, 5 Mon. 451, is to prevail, and that purchaser hold the property, notwithstanding the reversal of the decree, it will present a case of peculiar hardship to Hawkins and Cochran. They have already paid the Simpsons the full value of the land; it is now irreclaimably transferred from them to the purchaser, and unless they can induce the true owners to come before the court, and in this suit successfully assert their claim to the property, notwithstanding the five years of additional possession that have intervened since the decree, the injunction will be dissolved, and Hawkins and Cochran made to pay, in principal, interest, damages and improvements, at least double the value of the property, in addition to what they have already paid. But what are Adams' heirs to get by it, if they do submit to have their rights litigated in this suit? The possession has no doubt long since gone, with the title of the Simpsons, to the purchaser under the decree. If they assert and establish the superiority of their title, the chancellor cannot give them possession. Will he dismiss them, without affording them any relief? Or will he have the purchaser under his decree, who he is bound to protect, brought before the court, to litigate the question of title with Adams' heirs, and thereby put him in peril, at the instance, or for the sake, of those who no longer have any interest in the property? It seems to me that this would be not only a perversion, but a gross abuse of his powers.

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The case of *Morrison vs. Beckwith*, 4 Mon. 73, will be found to have no application to, or analogy with, this. There the purchaser did not, as here, seek a rescission of the contract on account of defect of title and the insolvency of his vendor; but merely an injunction against the collection of the balance of the purchase money, on account of a small sum still due on a stale mortgage, which embraced not only the small lot purchased by Beckwith, but other estate of the value of some hundreds of thousands of dollars. The court properly said he was not entitled to a perpetuation of his injunction, without awakening the old mortgage, and bringing the proper parties before the court, for the purpose of having it satisfied, either out of the balance of his purchase money, or by ratable contribution among the property holders. The attitude in which Beckwith stood towards the mortgagor, mortgagee and other purchasers, authorized him to bring them all before the court, and it was indispensable he should do so, to entitle himself to the only relief sought, a perpetuation of his injunction. Here, neither of the parties have a right to bring the true proprietors of the property before the court, for there is neither privity of estate or contract among them, and it is not at all necessary to the relief sought by the purchasers here—that is, a rescission of the contract.

CH. JUS. ROBERTSON'S OPINION.

CHIEF JUSTICE ROBERTSON:—As my associates have considered it proper to give their opinions *serialim* in this case, I will (though I see nothing in it which entitles it to such a distinction,) briefly and separately, present an outline of my opinion.

Statement of the case.

In the year 1800, Richard Adams of Virginia, published his last will, and died. Among other things, he directed his executors to sell a tract of land, which he claimed, on the Kentucky river, not far above its mouth, and containing about twenty thousand acres. The executors having refused to qualify, John Adams was appointed, (in Virginia,) administrator, with the will annexed; and, in 1807, gave a power of attorney to Col. William Steele, of Kentucky, to sell all, or any part of the land claimed by the testator on the Kentucky river. In June,



1818, Steele sold, and (in the name of John Adams, as administrator, with the will annexed,) conveyed to Walter C. Simpson and James Simpson, two hundred and eighty acres, of the twenty thousand acre tract, for the consideration of two hundred and fifty dollars. In August, 1818, Walter C. Simpson, James Simpson and Greenberry Simpson, for the consideration of seven thousand nine hundred and fifty dollars, part paid in hand, and the residue secured by bonds, sold and conveyed to William Cochran and John T. Hawkins, five hundred and thirty acres of land—"embracing (as the deed recites,) *two hundred and fifty acres under Howard's claim, and (the) two hundred and eighty conveyed by deed, by William Steele, attorney in fact for John Adams, to James Simpson and Walter C. Simpson, on the 17th of June, 1818.*"

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Howard's claim is covered by Adams' twenty thousand acres; and, though it appears to have been regularly entered and surveyed, no grant, as may be inferred, had ever been obtained for it. But the Simpsons and those under whom they claimed had been in the uninterrupted possession of the two hundred and fifty acres, under Howard's claim, and adverse to that of Adams, ever since the year 1796.

In 1820, Cochran and Hawkins filed a bill in chancery, to enjoin two judgments for a part of the consideration, and to obtain a rescission of the contract, on the ground, that John Adams had no authority, as administrator, *cum testamento*, to sell and convey the two hundred and eighty acres. In 1821, they filed an amended bill, alleging that Howard's title had never been perfected, and suggesting, also, a belief, that the Simpsons would not be able to indemnify them for a loss of the land, which they apprehended (as they averred,) to be a probable contingency.

The answers insist, that Cochran and Hawkins were fully apprised of the nature of the titles when they purchased the land; that there is no cause for apprehending an eviction, or disturbance, by Adams' heirs; that the only object of the bill was to get clear of a speculation, which had not proved profitable, and that the vendors

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circuit court, &  
its effects.

are able to make good any breach of their warranty, if there shall ever be an eviction.

The circuit court perpetuated the injunction to the judgments; rescinded the contract, and subjected the land to sale, for the amount which had been paid. The land was accordingly sold, and was bought by one Rigg, for the sum of one hundred dollars. The court approved the sale, and thereupon, decreed against the Simpsons three thousand four hundred and twenty nine dollars, forty seven and a half cents, with legal interest thereon, from the 11th of August, 1818. Under a *feri facias* on that decree, the right of redemption was sold for one hundred dollars, and was purchased by Rigg.

This writ of error is prosecuted to reverse that decree.

Such a decree cannot be just. If it be permitted to stand, the appellants, without fraud on their part, will have been deprived of their contract, and of the five hundred and thirty acres of land, for the sum of two hundred dollars, although the appellees have never been evicted or disturbed, in their possession, and have not shewn, that it is even probable that they will ever be evicted.

There is no proof of fraud, or of a misrepresentation of any fact, by the appellants; nevertheless, their *executed* contract has been rescinded, on the assumed ground, that they had *no title*; and still, after deciding that they had *no right, any potential or contingent right which could or might have been* in them, was sold by the decree! And thus it is not surprising, that the price which was bid, was so small.

As to the two hundred and fifty acres included in Howard's survey, there is no reason to apprehend an eviction. An adverse possession of thirty years is a satisfactory assurance, especially as no conflicting claim has been asserted. And a grant which may, if necessary, yet be obtained (as we presume,) would inure to the benefit of the appellees. Indeed a grant may be presumed from the lapse of time, combined with a possession which amounted, at the date of the decree, to more than thirty years; and, as the register has certified the survey, I will not presume that it was not made in time,

After 30 years quiet possession, apprehensions of adverse claims should not be indulged. A grant may be presumed when an entry, survey, and thirty years possession, are shewn.

more especially as there has not been even an intimation to that effect.

There is a technical defect in the title to the two hundred and eighty acres. The administrator, with the will annexed, had no legal power to convey the title, unless he had been qualified as administrator in Kentucky, and had thus acquired a right to convey, by the *lex loci rei sitæ*. But the facts were known, or must be presumed to have been known, by the appellees, at the date of the deed to them. *It was their duty to look into the documents of title, and their deed itself recites the fact, that their vendors derived all their right from a conveyance by the attorney in fact of the administrator, with the will annexed. The legal presumption, from these facts, is, that they had full knowledge of the nature and effect of the title. See Payne vs. Cabell, 7 Mon. 202, and Rawlins et al. vs. Timberlake, 6 Ib. 233. And the presumption, also, necessarily follows, that they agreed to risk the title, and rely only on the warranty. See 1 Johnson's Chy. Rep. 213, and 2 Ibid. 519. This view applies to both tracts. The deed recites that the plaintiffs derived claim from Howard.*

As the will authorized the sale of the land, and especially as the lapse of time and other circumstances indicate an acquiescence by the heirs and devisees of the testator, and a distribution of the proceeds of the sale among them, we may presume that, were they hereafter to assert a title to the land, they might be estopped in a court of equity. As the only objection which could be made to the sale, is, not that the will did not authorize it, but that the administrator, with the will annexed, did not qualify as such in this state, I am disposed to think that, in equity, the sale could be enforced. See *Kent's Com. on Principal and Agent*, and *Paley on Agency*. But, however this might be, as no new discovery as to the title has been made, and as it is such, and such only, as it was, and appeared to be, at the date of the deed, in August, 1818, no cause appears which will, according to any authority, or principle of equity, with which I am acquainted, or which I have ever seen, authorize a decree for rescinding the contract, for defect of title to the two hundred and eighty acres. And it seems to me very clear, that the alleged defect in

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A conveyance of land in this state, by a foreign executor, passes no title. *Ante*, 306, 316.

The grantee is presumed to understand the circumstances of the title, so far as they are indicated by recitals in the deed he receives:—hence the presumption that he was to risk the title, and rely on his warranty. [Judge Nicholas's of a different opinion, *ante*, 317.]

Where land was sold in pursuance of a power given by will, but by a conveyance defective and void, the heirs of the testator having long acquiesced, and probably received the proceeds, the presumption is, that they will never set up any claim—that they could do so successfully, is not certain. [See Judge Nicholas's remarks on this point, — *ante*, 322.]

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Vendees apprehending a loss of the land, and inability of their warrantor to indemnify them, should bring the parties from whose title the danger is apprehended, before the court, to assert or disclaim their right. [*Ante*, 309, 305, 318.] If the vendors are solvent, the only remedy is upon the warranty. *Ante*, 305.

the title to the two hundred and fifty acres, cannot justify a rescission. As to that tract, there seems to be no danger, or just cause even of apprehension.

As then there had been no eviction, or fraud, why should the contract be rescinded? If the plaintiffs in error were insolvent, and the defendants really apprehended an eviction, they might have filed their bill *quia timet*, and enjoined the judgments, until they could ascertain, by bringing Adams' heirs before the court, whether they would, or could, assert any claim successfully, or would confirm the sale made by the personal representative. That was the utmost of their equity. If the plaintiffs were able to indemnify the defendants for an eventual eviction, even an injunction would not have been allowable. The only remedy would, in that event, have been a suit on the warranty. The insolvency of the plaintiffs has not been proved in such a manner as to leave no doubt whether they would be able to indemnify the defendants for the loss of the two hundred and eighty acres, worth comparatively little—that is, about fifty cents an acre. But let it be admitted, that they are hopelessly insolvent: what more had the defendants a right to ask than a suspension of any further payment, until further and satisfactory assurance of title? There may have been a mutual misapprehension as to the legal power of the administrator to sell the land. But were that admitted, or had it been proved, it could not have affected the question of rescission, because it was a mistake as to the law, and not as to the fact.

Before the defendants should have *maintained* an injunction, and required further assurance, they should not only have shewn reasonable ground for apprehension of irreparable loss, but should have sought a satisfactory assurance of title. The only allowable object of their bill, was to enjoin the judgments until they should be secured, and until the court should be able to dispose of the case in such a manner as would be just and safe to all persons concerned. But the defendants did not ask for further assurance; they did not make Adams' heirs parties; they did not even *suggest*, that they were in new danger of eviction or disturbance; or that there was a

probability that Adams' heirs would ever attempt to evict them, or that they could ultimately succeed, should such an attempt ever be made. But, though in peaceable possession, under an *executed* conveyance, with warranty, and though there is no proof of fraud, or misrepresentation of any material fact, the defendants sought, at once, a rescission of the contract, without asking further assurance, or shewing any wish to obtain it, or making any effort to bring about a confirmation, or an eviction.

Without fraud or misrepresentation, the plaintiffs were not bound to make further assurance, or to litigate (as to the title,) with Adams' heirs. It was not, therefore, *their* duty to make those heirs parties. But it was the duty of the defendants to have made them parties before they should have enjoined the judgments; because, otherwise, they could not shew, that they are entitled either to a rescission of the contract, or to a perpetuation of their injunction. Upon such a bill *quia timet*, the complaining parties should bring before the court the persons from whom they apprehend danger, in order to shew the nature and extent of that danger, and to be secured against it, if it actually exist. And unless they manifest a disposition, and make proper efforts to ascertain and settle whatever may jeopard their title, or disturb their peace, they do not present themselves acceptably to the chancellor. Do they really apprehend, that Adams' heirs, or any person who may claim under Howard, will ever evict or disturb them? Let them call on those persons, either to assert, or to waive, their claims, and the chancellor may enjoin the judgments, until the issue as to title shall be satisfactorily settled. And then, if it should be ascertained, that the title of the defendants in error is secured, their injunction should be dissolved; but if they should be evicted, actually or virtually, the injunction should be perpetuated, according to the extent of that eviction. Or if, without making other parties, the plaintiffs in error choose to secure an indemnity for any eventual loss which the defendants may sustain, in consequence of a defect of title, the injunction might be discharged. See *Morrison's administrators et al. vs. Beckwith, 4 Monroe, 77.*

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vs.  
*Hawkins &c.*

It is the duty of the vendees who allege, that there is a paramount title, on account of which they claim a rescission of the contract, to bring the holders of such title before the court—*Ante, 309.*

[Judge Nicholas dissents on this point: *ante, 319.*]

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The case just referred to, also shews, that, to entitle a party in such a case as this, even to an injunction, he should bring before the court all those whose claims he may fear. And why should he not? He desires a suspension of the payment until he can ascertain whether he ought, in equity, to make payment. Should he not then proceed without delay, to employ the proper means for ascertaining whether the danger which he wishes to avoid really exists, and to have it removed, if it do, in fact, exist? He should not have his injunction perpetuated, unless he shall lose the land, or a part of it, and therefore he should proceed in such manner as to enable the court, upon ascertained facts, and without injustice, either to dissolve, or perpetuate, the injunction. A perpetuation of the injunction without an eviction would be manifestly unjust; because, in that event, a party might keep both the land and the consideration. As then there was no fraud, or misrepresentation of any fact respecting the title, and as the defendants in error knew, or should be presumed to have known, the nature of the title derived by the plaintiffs from Howard and from Adams, and accepted a conveyance, relying upon the warranty of title—the plaintiffs are not bound to litigate as to the title, unless the defendants will allege that they apprehend an eviction, and will ask for an investigation of title, and will, for that purpose, make the proper parties for finally adjusting all controversy. This not only seems to me to be obviously right and equitable, but to have been virtually settled by this court, in *Morrison vs. Beckwith*, *supra*.

The sale of an estate under a decree in chancery does not effect the right of one (not party to the suit,) who held a title paramount to that of him whose title was sold under the decree. *Ante*, 313. [See Judge Nicholas on this point; *ante*, 328.

But it is said that, (*perhaps*), Rigg may hold the land, in consequence of his purchase under the decree. Of that I should have no apprehension. But were it conceded that he might hold the land, the concession would not change the attitude of the parties. If the defendants improperly procured an erroneous decree for selling the land, and had it sold, so as to divest them of *their* claim to it, the plaintiffs should not thereby be deprived of *their* equitable rights, nor perpetually enjoined from enforcing their judgments, unless the defendants can shew such a case as will authorize a perpetuation of the injunc-

tion. This they cannot do without shewing that their title never could have been perfected ; which cannot be made to appear, unless those whose claims may be feared, be made parties, and shall successfully assert title. Adams' heirs will not be affected by the sale under the decree. And the court, having possession of the case, might, should it be deemed necessary or expedient, bring Rigg before it, in the event of Adams' heirs asserting title, and thus finally settle the whole controversy. It never can be settled satisfactorily or justly in any other way.

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1833.

*Doram &c.*  
vs.  
*The Com'lt'h.*

## MANDATE.

It is decreed by the court, (*Judge Underwood* concurring, and *Judge Nicholas* dissenting,) that the decree of the circuit court, be reversed and the cause remanded, with instructions to allow a reasonable time to amend the bill, and make other parties ; and unless, within a reasonable time, such amendment be made, to dismiss the bill without prejudice. But, in the mean time, to maintain the injunction ; and if the bill be properly amended, then to render such a final decree as the new and ultimate aspect of the case may render just and equitable, according to the opinion of this court.

Mandate.

## Doram and Ryan vs. The Commonwealth.

WARRANT.

[Mr. Brown for Plaintiffs : Atto. Gen. Morehead for Defendants.]

FROM THE COUNTY COURT OF KNOX.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 18.

DORAM and Ryan, free men of color, were arrested in Knox county, upon a warrant, charging that they had migrated to this state, in violation of an act of assembly of 1808, (3 *Littell's Laws*, 499 ;) and were recognised to appear in the county court.

The act (of 1808,) under which persons of color emigrating to this state, may be compelled to depart, is a penal law : it dispenses with the trial by jury, and is so far unconstitutional.

Upon a hearing in that court, an order was made, requiring them to give a recognisance, binding them to depart from the state, and directing that, if they should

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*Doram &c.*

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*The Com'th.*

Persons of color charged with emigrating to the state, should be tried separately: a joint proceeding against several, is irregular.

This court has jurisdiction to revise the proceedings of co. courts, in cases of persons of color charged with migrating to this state.

fail to do so, they should be sold for the term of one year. They failed to enter into the required recognisance; and have prosecuted this writ of error to reverse the order of the county court.

The jurisdiction of this court is not doubted. See 1 Dig. 382, and *Ibid*, 367.

The act of 1808 is highly penal. The proceeding authorized by it, must be considered in the nature of a *prosecution* (by information) for an *offence* against the commonwealth. The penalty is a temporary disfranchisement of a free man, as a punishment for violating a public and economical law of the state.

The tenth section of the tenth article of the constitution of Kentucky declares, among other things, that the accused shall have, "in prosecutions by indictment or information, a speedy public trial by an *impartial JURY* of the vicinage." There was no jury in this case; and this court is clearly of the opinion that, the act of 1808 should be interpreted as dispensing with a jury; and therefore it, so far, conflicts with the *supreme law* of the land. The act cannot be constitutionally enforced without the intervention of a jury. A free man cannot be sold, even for an instant, unless a jury of his peers shall have passed condemnation upon him.

Moreover, the proceeding in this case is joint, when it should have been several.

Wherefore, the order, for selling or hiring Doram and Ryan, is set aside, and annulled.



DECISIONS  
OF  
THE COURT OF APPEALS  
OF KENTUCKY

AT THE  
FALL TERM....1833.

Clark vs. Schwing.

DEBT.

[Mr. Richardson for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT FOR JEFFERSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court—  
Judge Nicholas did not sit in this case.

October 8.

THIS writ of error is prosecuted to reverse a judgment rendered against the plaintiff (Clark,) in an action of debt, which he instituted against the defendant (Schwing.)

The declaration contained two counts. In the first, the plaintiff averred, that the defendant, on the 19th of July, 1822, by his note of that date, "promised, sixty days after date, to pay plaintiff, or order, fifteen hundred dollars, without defalcation, negotiable and payable at the Louisville Branch Bank, for value received;" that the note having been assigned to said Bank, and the defendant having failed to pay it, the plaintiff, after it became due, did "take up and pay the same to the said President, Directors and Company; of which defendant had due notice; whereby he became bound to pay the plaintiff fifteen hundred dollars.

Declaration.—  
Count, held (p. 334) to be on a note, not on the liability accruing to the payee, in consequence of his having taken it up, after having endorsed it over to a third party

The second count was for money received to the plaintiff's use.

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Clark  
vs.

Schwimg.

Pleas ; demur-  
rers, and judg-  
ment for defend-  
ant.

The defendant, in a plea, No. 2, pleaded, to the whole declaration, that the plaintiff's cause of action had not accrued within five years next before the institution of the suit. A demurrer to that plea was overruled, and the plaintiff failed to reply.

The defendant then filed another plea, No. 5, to the first count ; in which plea he averred, that the President, Directors and Company had obtained a judgment against him on the note, which judgment the plaintiff afterwards paid off and satisfied, more than five years prior to the impetration of his writ, and that, therefore, his cause of action did not accrue within the last five years. A demurrer to that plea having been also overruled, and the plaintiff having failed to reply, judgment was rendered in bar of his action.

The declaration being good on its face, the pleas present the only questions which will be considered.

Question, whether the action, as stated, is on the note, and not within the statute of limitations, or on an implied liability - barred in 5 years.

The second plea, so far as it applies to the second count, is unquestionably good ; but whether it is sufficient to bar the cause of action described in the first count, will depend on what that cause of action, as stated, shall be deemed to be. Is the first count on the note, or only on the liability implied from the facts alleged ? If the latter be the foundation of the action, five years would bar. If the note be the foundation of the suit, the limitation of five years would not apply, unless such a note should be deemed, like a bill of exchange, a simple contract, and, in that event, five years might bar a suit upon it.

The assignment of a note to the Bank of N.Y. is *prima facie* evidence of its having been discounted, and thereby placed on the footing of a bill of exchange.

As the assignment to the Bank is (according to authority,) *prima facie* evidence that the note was discounted, and was thereby placed, as to negotiability and the rights of endorsers and holders, on the footing of a bill of exchange, if, as averred, the plaintiff, as endorser, paid and took up the note, in consequence of the defendant's defalcation, he had a right, according to the *lex mercatoria*, to erase, or consider as erased, the assignment to the Bank, and might, as holder and payee, maintain a suit in his own name on the note. Looking, therefore, to the allegations of the first count, we are disposed to consider that count as founded on the note.

A party to such note, who has taken it up, has a right to strike out his endorsement, and proceed upon it, against those who were liable before him, for the payment.

and not on an implied liability, as the defendant seemed to suppose.

But, nevertheless, if, as the plaintiff's counsel has argued, the note be in all respects a bill of exchange, the second plea would be good as a bar to the first count; because a bill of exchange is a simple contract, and the liabilities resulting from it may be barred by the lapse of five years.

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A bill of ex. is a simple contract, and the liabilities upon it may be barred in 5 years.

Here an important and undecided question arises.

Does the eighth section of an act of 1812, placing certain unsealed writings upon the footing of specialties, apply to such a note as that which we are now considering? We feel compelled to decide that it does. The section referred to, is in these words:—"All writings *hereafter executed* without a seal or seals, stipulating for the payment of money or property, or for the performance of any act or acts, duty or duties, shall be placed upon the same footing with sealed writings containing the like stipulations; receiving the same consideration in all courts of justice, and, to all intents and purposes, having the same force and effect, and upon which the same species of action may be founded as if sealed." This note directly and expressly stipulates for the payment of money, and we can perceive nothing in the language of the statute, its subject matter, its policy, or presumed object, which would authorize an interpretation so restricted as to exclude such a writing from its operation.

The act of 1812 (§8) placing unsealed writings on the same footing as those that are sealed, *does* apply to notes that have been placed on the same footing with bills of exchange—consequently (as to the drawers,) they are not within the statute of limitations.

But it does not follow as a necessary, or even a rational or consistent consequence, that such a note, thus negotiated, possesses none of the attributes of a bill of exchange which were imparted, by an act of 1806, to notes discounted by the Bank of Kentucky. That act, after establishing the Bank, and prescribing regulations for its government, provides that, "all notes or bills at any time discounted by the said corporation, shall be and they are hereby placed upon the same footing as foreign bills of exchange, so that the like remedy may be had for the recovery thereof, against the drawer or drawers, endorser or endorsers, and with the like effect, (except so far as relates to damages,) any law, custom or usage to the contrary notwithstanding."

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But bills of exchange and endorsements on notes are not within the act, and actions on them are subject to the bar by time.

A plea to the whole declaration, if insufficient as to any count, will not be sustained.

When a judgment has been recovered ag't a party to a bill of ex. or note, no other action can be maintained against the same party on the same bill or note.—If one under a subsequent liability (as endorser,) on such bill or note, pays it,

So much of the act of 1806, and so much only, as is inconsistent with that of 1812, must be deemed to have been repealed by the latter act. Except as to the dignity of the writing, the remedy upon it, and the effect of that remedy, a note, when discounted by the bank, possessed all the attributes of a bill of exchange which the act of 1806 provided that it should have. The only difference is, that, since 1812, it is a specialty; before, it was a simple contract. Now it is just such a writing as it would have been had a statute declared, that all bills of exchange should be deemed contracts under seal. Such an enactment would not have changed the rights or remedies as between endorsers and endorsees; nor have affected the negotiable quality of such contracts. Nor does the act of 1812 affect the negotiability of a note discounted by the Bank, or change the rights or remedies of parties to it, except so far as the drawer is concerned. *Bills of exchange* are not embraced by the act of 1812, because they contain no direct stipulation for the payment of money; nor, for the same reason, are endorsements upon a note negotiated in Bank within the operation of that statute. But the note itself is within the letter, and seems to be within the spirit and policy of the act. In a suit upon it, against the drawer or obligor, it must have, in all respects, the effect of a writing under seal; and, consequently, such a suit would not be barred by the limitation of five years; and, of course, the second plea did not meet the first count; and, therefore, as it purported to be a plea to the whole declaration, the court erred in overruling the demurrer to it.

The fifth plea must, also, be deemed a plea of the statute of limitations; and consequently, in that respect, as the first count is on the note, the plea was not good. But it contains matter which, if sufficiently pleaded, should defeat the action on the note. It avers that, prior to the institution of this suit, and to the payment by the plaintiff, the Bank, as the last endorsee, had obtained a judgment against the defendant, in a suit which it had brought on the note. If that averment be true, another suit on the same note could not be maintained by the payee, or endorsee, against the obligor. Whether the

note be considered a bill of exchange, or only an ordinary specialty, all the legal liability which it imposed on the drawer or obligor, to the payee or obligee, was transferred to the Bank by the endorsement, and was merged in the judgment which was obtained by the Bank. The payment of that judgment, and even a reassignment of the note to the plaintiff, could not have reinvested him with his preexistent right to sue on the note; but, at the utmost, could only have entitled him to a suit on the implied liability resulting from the payment, or to the benefit of the judgment upon the principle of subrogation. A party cannot be sued twice, availablely, on the same liability resulting from the same contract. See *Lenox vs. Prout*, 3 *Wheaton's Reports*, 520. Schwing's liability on the note (to the payee) was extinguished by the judgment. *Transit in rem judicatum*.

But the fact that the Bank had obtained such a judgment as that alleged, would shew only that the suit could not be maintained in the plaintiff's name, nor upon the note. It does not tend to shew that the suit, as brought, on the note, had been barred. If the plea had relied on the judgment as a bar to the action, instead of relying on it as inducement to the statute of limitations, it might have been good and effectual. But a plea of the statute of limitations cannot be sustained upon the ground that it avers special matter which shews that the action has been misconceived, and that, if it had been brought on the *assumpsit* implied from the payment of the judgment it would have been barred by the limitation of five years. As a plea of limitation, (and in that character it must be considered,) the fifth plea is not good, and therefore, though it contains matter which, if properly pleaded, might defeat the action, nevertheless, as the demurrer admitted only what was well pleaded, it was erroneously overruled; and the judgment thereupon rendered cannot be sustained.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with instructions to sustain the demurrers to the second and fifth pleas.

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his remedy, against the party who had been sued, is on the *implied assumpsit*, or by taking the control and use of the judgment.

A plea (of limitation,) which shows that the plaintiff's action is misconceived, and that (tho' the present action is not) the only appropriate action would be barred—is insufficient.

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1833.

CHANCERY.

# Shackleford *against* Helm and Others.

[Mr. Crittenden for Plaintiff: Messrs. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR BRECKINRIDGE COUNTY.

October 8.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A creditor having agreed to take commonwealth's paper for his specie debt, and the debtor having failed to pay (or prove a tender,) until the paper had risen in value, the debtor is not entitled, in equity, to any allowance for the advance in the price of the paper; nor to be exempt from the accruing interest on the debt.

THE plaintiff in error enjoined a replevin bond which he, as principal, with others as his sureties, had executed, in 1821, for a debt contracted in or about the year 1818. His bill alleges that, for an inconsiderable consideration, the defendant (Helm) had agreed to accept the nominal amount of the bond in notes of the Bank of the Commonwealth, which were afterwards tendered to him, but refused; and that a partial payment had been made in specie, for which a credit is sought equivalent to the amount in Commonwealth paper of the money so paid; that execution had issued for the amount of the replevin bond; and that, therefore, the plaintiff is entitled to an injunction, and a specific execution of the agreement to take depreciated paper, by compelling the defendant to accept, for the residue of the bond, after deducting the payment, the money value of Commonwealth paper, at the date of the alleged tender, or by rendering such other decree as should be deemed most equitable.

A debtor is not excused from the payment of interest, because the fund is attached in his hands, by bill in chancery, unless he brings the money into court, is restrained from using it.

The answers resist the relief sought by the bill, and require proof of its essential allegations.

The decree of the circuit court perpetuated the injunction, for three hundred forty one dollars forty three cents—the paper value of two hundred seventy three dollars eighteen cents, when the latter sum was paid; and for one hundred eighty seven dollars fifty cents—the paper value of one hundred and fifty dollars, when that sum was paid: (each sum to be credited as at the time when paid to Charles A. Wickliffe, under a decree rendered in his favor on a bill filed by him, as a creditor of the defendant, for attaching so much of the debt due by the plaintiff to the defendant;) and dissolved the injunction for the residue, with damages and costs, requir-

If a complainant sustains his claim for any thing that was unjustly withheld from him, costs should be decreed in his favor,—not against him.

ing the defendant, however, to take Commonwealth paper for the amount remaining due.

That decree is now brought up, for revision, by this writ of error; and the plaintiff in error complains—*first*, that he was not exonerated by being allowed to pay the money value of Commonwealth paper at the time of the alleged tender; *second*, that, if he pay in appreciated paper, he should not have been required to pay interest; *third*, that interest should not be charged on the amount paid Wickliffe, from the filing of his bill, or at the utmost, from the date of his decree, and, *fourth*, that the decree for costs is erroneous.

These grounds will be briefly noticed in their numerical order.

*First.* The alleged tender has not been proved; and therefore, the plaintiff has no just cause for objecting to the payment of Commonwealth paper.

*Second.* As the plaintiff should do equity, as a condition of relief; and, as he has withheld the Commonwealth paper, he should pay interest; for, otherwise, it would not be just to compel the defendants to take depreciated paper for a specie debt, unless the paper had been tendered at a proper time, and had been refused.

*Third.* The plaintiff was not actually enjoined by Wickliffe; nor did he deposite the money in court; nor has he shewn, or even alleged, that he was prevented from making ordinary use of it. Wherefore the pendency of Wickliffe's suit should not exonerate the plaintiff from interest. Nor is he entitled to a credit for more than the value of what he paid to Wickliffe, estimated, not at the date of the decree, but at the time of the payment.

*Fourth.* But, as the plaintiff obtained some relief, and the record undeniably shews, that his bill was necessary for that purpose; we are clearly of the opinion, that he, and not the defendant, was entitled to a decree for costs.

For the last reason alone, the decree cannot be affirmed.

Wherefore, it is decreed by this court, that the decree for costs be reversed, and the cause remanded, with instructions to decree to the plaintiff in error, his costs in the court below; and also, that the defendants pay to the plaintiff, his costs in this court.

Fall Term  
1832.

*Shackelford*  
vs.  
*Helm &c.*

If a case be affirmed as to every thing, but the cost, still, if reversed as to that, the plaintiff in this court recovers costs.

Fall Term  
1833.

CHANCERY.

**McCans and Wife against Board's Heirs.**

[Mr. Crittenden for Appellants : Messrs. Morehead and Erown for Appellees.]

FROM THE CIRCUIT COURT FOR BRECKINRIDGE COUNTY.

October 8.

Judge NICHOLAS delivered the Opinion of the Court.

Statement of the case, and question to be decided.

IN 1821, Richard Board, in his last sickness, made a nuncupative will—proved and recorded since his death,—by which he devised his whole estate to his wife during widowhood. She administered on his estate, and in 1825, married McCans. Guardians were then appointed to the infant children of Board; at whose instance, commissioners were appointed by the county court, and dower allotted to Mrs. McCans, in his real estate and slaves.

On a bill filed against her by the infant children, for settlement and distribution, the circuit court, considering her as not entitled to any portion of the slaves, ordered those assigned to her for dower, to be surrendered to the children; and the correctness of that portion of the decree presents the only question that need be particularly noticed.

In support of the decree, it is contended, either that the slaves passed to her by the nuncupative will, and in that case, she lost them by her marriage in breach of the condition upon which they were devised to her; or, if they did not pass by the will, then she has lost all claim to them by failing to renounce the provisions made for her by the will, according to the statute.

Real estate does not pass by nuncupative will.

As real estate cannot be devised by nuncupative will, and as our statutes have converted slaves into real estate, and directed them to pass by will as land, there is but little plausibility in favor of the first position.

Nor do slaves, now, since the act of 1800, directing that they

The other is entitled to more consideration. The twenty fourth section of the act concerning wills, 2 Dig. 1246, declares, that a widow not making a renunciation of her



husband's will, as therein prescribed, "shall have no more of her husband's *slaves* and personal estate than is given her by his will." At the time of the passage of this act, slaves were personal estate, and, as such, would pass by a nuncupative will. Is this part of the act still in force, so far as regards this question, notwithstanding subsequent statutes have prevented slaves from passing by such will? We are inclined to think not. It would be at war with the equitable policy upon which this portion of the statute was framed, to make it apply to any description of property which it was not in the power of the testator to pass by the description of will which it requires to be renounced. It would be to thwart, rather than further, the legislative intent, if we were to determine, that her failure to renounce a will, such as the law does not allow to pass slaves, should forfeit her dower claim in them. In one of two ways, she certainly ought to escape the penalty imposed by the statute for failing to renounce. Either, because a nuncupative will is not now such an one as the statute requires to be renounced; or, by considering the act concerning wills, of 1797, and the act of 1800, directing slaves to pass by wills as land, as in *pari materia*, and to be construed together as one act, and making the latter a repeal of so much of the former as falls within this subject; nor can any novelty be imputed to this mode of treating the two acts. Nothing is more common than for courts to thus blend together different acts, or parts of acts, relative to the same subject, in order to extract an operative and consistent legislative intention from the whole. Infinite mischief would ensue, and the legislative will would be as often violated as fulfilled, if this were not done. All statutes upon the same subject, from mere necessity, must be taken and construed together, in order to ascertain the legislative intention; which intention, in all rational jurisprudence, must be the guiding star of the courts, in their endeavors to achieve the true application of legislative rules. Former rules, of ascertained intent, and based upon an obvious policy, or principle, must as necessarily yield to, and be modified to suit subsequent enactments, which so far alter the law as to change the operation of the rule,

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McCans &amp;c

vs.

Boara &amp;c.

shall pass by will as land—  
hence, the widow who fails to renounce the bequests of a nuncupative will, is nevertheless, entitled to be endowed of the slaves.

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1833.

*McCans &c.*  
vs.  
*Board &c.*

as to its policy, or principle, as if the prior rules were repealed by the subsequent in express terms, or as if they stood in direct repugnance the one to the other. Every thing that has been enacted upon any given subject, constitutes altogether, in mass, the materials from which the courts are bound to extract a true legislative intention, which, in all its different modes of application, shall, as near as practicable, be consistent with itself.

If these principles be correct—of which we entertain no doubt—there can be but little room for dispute as to the proper solution of the question before us. For there can be no doubt that the legislature, blended slaves with personal estate, in the forfeiture to be incurred by the widow, for failing to renounce, because either of them, as the law then stood, would pass by a will that would pass the other. The subsequent change of the law in this particular, and the abstraction of slaves from the operation of a nuncupative will, should be deemed a *pro tanto* revocation, or repeal, of the prior law. At the passage of the first act, the widow had the power of electing to take the provision made for her in slaves by her husband's nuncupative will; thence the propriety of restricting her to that provision unless she renounced in reasonable time. But as the law now stands, she has no such election; she cannot, as in this case, take that portion of the provision, which her husband intended for her; hence the propriety and necessity of saying, that, so far as regards slaves, the twenty fourth section of the act concerning wills, no longer applies to nuncupative wills.

Widow retained the whole real estate and slaves, and provided for the children — the income and expenses to be set off against each other. For their support after she is endowed, and their part surrendered, she will be entitled to a compensation.

As the off-setting of the use of all the slaves and real estate, against the cost of schooling, clothing, and board, ing the children, is the most that can be done for Mrs. McCans, under the circumstances, we think their mutual demands against each other, should be closed in that way, up to the 1st of January, 1826. If any of them have lived with her since that time, she should receive from them reasonable compensation therefor. But as she has not specifically prayed relief over against the children, or their guardians, to that effect, in her cross bill, she cannot obtain it in this suit.

The decree must be reversed, with costs, and cause remanded, with directions for a decree to be entered, quieting McCans and wife in the possession of the real estate and slaves allotted to her for dower, and dismissing the bills and cross bills, with costs, but without prejudice to any claim of McCans and wife, for the board, clothing, or tuition, of either of the complainants, since the 1st of January, 1826.

Fall Term  
1833.

*Eubank*

vs.

*Hampton.*

### *Eubank against Hampton.*

CHANCERY.

[Mr. Hanson for Appellant : Mr. James Trimble for Appellee.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 8.

IN 1798, Eubank executed a bond to Vaughan, for the conveyance of forty eight acres and three fourths of land, described by its boundaries. This bond Vaughan assigned to George Hampton, the appellee, who mortgaged the land to Jesse Hampton, in 1825. While George Hampton was absent from the state, as he alleges, Eubank and Jesse Hampton came to some agreement, the result of which was, that Eubank conveyed to him (Jesse Hampton) fifty one acres, more or less, in discharge of the bond, which was given up to be cancelled by said Jesse, to whom it had been delivered after the execution of the mortgage, but without any assignment thereon.

The deed from Eubank to Jesse Hampton reserves a life estate in the land conveyed, to Nancy Epperson, wife of John Epperson.

The mortgage from George to Jesse Hampton states, that the land was conveyed to the latter, for the purpose of securing him against loss in consequence of his suretyship in a debt due to Martin.

In 1826, George Hampton filed his bill against Jesse Hampton, Vaughan and Eubank, charging that the debt to Martin had been discharged, and praying that the

Surveys cannot be made with precise accuracy, in the usual modes: 5 pr. ct. is a customary allowance for variations.

Where a party was bound to convey a specified quantity of land—a tract described by its boundaries; which, upon a survey made by order of court, was found to exceed that specified quantity, a fraction more than 5 pr. ct. held that this small variation would not justify the vendor in withholding the supposed surplus in making the conveyance

Fall Term  
1833.

*Eubank*  
vs.  
*Hampton.*

Where a party covenanted to convey a tract of land, described as containing a certain quantity, and by boundaries, he shall convey according to the boundaries; and cannot withhold the surplus.

Where a vendee has entered on the land, and retains the possession, under an executory contract, the vendor cannot resist the claim to specific execution on account of the lapse of time.

A party who has recently recognised an obligation to convey, cannot resist the claim on account of its staleness.

deed from Eubank to Jesse Hampton might be cancelled, and that Eubank might be compelled to convey to him, according to the bond. The court decreed according to the prayer of the bill, and Eubank appealed.

Eubank objects to the decree, because, he says, the boundary mentioned in the bond includes more land than forty eight and three fourths acres, and that he is only bound to convey that quantity. The surveyor's report shews, that the boundary mentioned in the bond, contains fifty one acres, one rood and twelve poles. The difference in quantity is, therefore, two acres, two roods and twelve poles only. It is impossible to make a survey in the ordinary method of surveying with precise accuracy. Some allowance must be made for the unevenness of the ground, and the deviations of surveyors and chaincarriers from a straight line; in consequence of which, it is impossible, in the usual mode, to ascertain the exact distances from corner to corner. The excess in this case is but a fraction above five per cent. which is the customary allowance. The difference is so trifling, that we should be averse to disturb the decree on that account. But, upon mature consideration, we are of opinion, that the appellant is bound to convey according to the boundary mentioned in the bond, and that he cannot reduce the quantity to forty eight acres and three fourths, if the boundary contains more. Eubank objects to cancelling the deed from himself to Jesse Hampton; and insists, that the appellee's claim is stale, being of more than twenty years standing. It is inferable, that the land was improved, and in the possession of George Hampton. If that was the case, the staleness of the demand does not operate against the specific enforcement of the contract, as this court has frequently decided. But after the appellant has acknowledged its validity, so far as to execute it, at least in part, with Jesse Hampton, and when this objection is taken for the first time in the answer to the amendatory bill, we think it not available as a defence. When Martin's debt was paid, Jesse Hampton had no right whatever to take a deed to himself. True, it does not appear, whether the debt was paid before, or after the deed was executed. Be that as it may, Jesse Hamp-

ton could not, by taking the deed to himself, thereby convert the estate in which he had no interest, except as mortgagee, into his absolute property discharged from the equity of redemption. He had no right to take other estate, or a less quantity than Eubank's bond called for. He had no right to incumber it with a life estate in favor of Mrs. Epperson. These acts of Jesse Hampton, who has permitted the bill to be taken for confessed against him, well authorized the court to set aside his deed. That being done, the appellant cannot complain that he is compelled to perform his bond in favor of the true proprietor.

It is objected, that Mrs. Epperson and her husband were not before the court, and that it was erroneous to cancel a deed under which she was entitled to a life estate in the premises conveyed, when she was no party. This was erroneous, and for that cause the decree is reversed, and the cause remanded, for the purpose of giving the appellee leave to amend his bill, making Epperson and wife parties, or of dismissing without prejudice. The appellant must recover his costs.

Fall Term

1833.

Taylor

vs.

Brodrick.

## Taylor vs. Brodrick.

WRIT  
OF DOWER.

[Messrs. Morehead and Brown for Appellant : Mr. Hord for Appellee.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 9.

THE appellee sued the appellant, in a writ of dower, *unde nihil, &c.* and declared as follows :—

“ Mary Brodrick, a widow, who was the wife of David S. Brodrick, deceased, by Francis T. Hord, her attorney, comes and demands against Robert Taylor, the third part of six lots, or thirty five acres of land, with the appurtenances thereunto belonging, which is situate in the town of Washington, on the east side thereof, in

Suit at law for dower—Dec'n, demanding dower, and mesne profits—held sufficient for the former object, not for the latter. See p. 347.

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1833.

*Taylor*  
vs.  
*Brodrick.*

the county of Mason, and are known on the plat of the town of Washington, as lots No. 110, 127, 128, 129, 130 and 131 ; which said lots and parcel of land, with the appurtenances thereunto belonging, were owned and possessed in fee, by the said David S. Brodrick, in his life time, and while the said Mary was his lawful wife; which said lots are now claimed and possessed by Robert Taylor, who claims the same by purchase. And the said Mary demands her dower therein, being entitled thereto by the endowment of the said David S. Brodrick, deceased, heretofore her husband, whereof she is deforced and hath nothing &c. ; and she prays that she may recover against the said Robert Taylor the value of the mesne profits arising from the use of the undivided third of the premises of which her husband was so seized, as aforesaid, from the death of the said David S. Brodrick, to wit, from the — day of September, 1823, up to the rendition of the judgment herein ; which she avers is reasonably worth one hundred dollars a year ; of which she hath had nothing, although the said Robert Taylor has often been requested the same : wherefore &c.”

*Plea; demurrer, sustained; enquiry on damages, verdict judgment, in the court below.*

Taylor appeared, and pleaded, that David S. Brodrick had not died seized of the lots. A demurrer to the plea was sustained ; and thereupon, Taylor having failed to plead over, a jury, sworn to enquire of damages, returned the following verdict :—“ We find that David S. Brodrick, in his life time, (and during that time Mary Brodrick was his wife,) owned and possessed lots No. 110, 127, 128, 129, 130 and 131, in the town of Washington ; which he conveyed, and they have come to be owned and possessed by Robert Taylor, under him, who now lives in the possession thereof in which said Mary Brodrick is entitled to dower.” Whereupon, the court rendered the following judgment :—“ Therefore, it is considered by the court, that the plaintiff recover against the said defendant, according to the finding of the jury in their verdict aforesaid, one third part, by metes and bounds, her dower in the lots No. 110, 127, 128, 129, 130 and 131, in the town of Washington, which came to be owned and possessed by the defendant, and who now

lives in the possession thereof, according to the value and condition of the said lots at the date of the conveyance made by the said David S. Brodrick."

To reverse that judgment, this appeal is prosecuted.

The appellant insists, that the count is insufficient; the plea good; the writ of inquiry improper, and the judgment vague and erroneous.

*First.* The count is substantially such as is prescribed in ancient forms. See 2 *Sauv. Rep.* 44. It contains much that is superfluous; but its redundancies are not such as to vitiate the essence, which is good and sufficient to authorize a judgment for dower. As there is only one demandant, and one tenant, holding and claiming all the lots, in the same town, it was proper to include the whole in one suit; and although the count may not allege such seizin by Brodrick, or such a demand by the demandant, as would entitle her to damages, nevertheless, it is sufficient to authorize a judgment for dower, and no damages were assessed: so that there is no sufficient cause for objection to the count.

*Second.* The plea is not good. Whether the husband died seized or not, is not material, except as to the question of damages. And, as the count shewed no right to damages, and did not allege seizin in David S. Brodrick at his death, the plea was immaterial; and moreover, it could not be, as it purported to be, a bar to the action, even had the fact pleaded been material.

If the appellant had enhanced the value of the land by improvements, that fact, properly pleaded, together with a purchase from Brodrick, might have been available to shew that the appellee was not entitled to dower in one third of the land, but only in a third of the value without such enhancement.

*Third.* As the count contains no allegation which entitled the demandant to damages, the writ of enquiry as to damages was certainly irregular and unnecessary. And it may, also, be admitted, that the finding of the jury was altogether anomalous and uncalled for by the law, or by the oath which was administered to the jury.

was irregular; but the verdict being for the dower only, not for any damages, may be disregarded, and the judgment, on the default, might be sustained.

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1833.

Taylor  
vs.  
Brodrick.

Several parcels of land in possession of the same tenant, & in the same town, may be included in one suit at law for dower.

A plea, in a suit for dower, that the husband did not die seized of the land, is immaterial, and no bar to the action.

If the def't was purchaser from the husband, & has added to the value of the land by improvements, those facts may be pleaded, & will be available to curtail the allotment.

The dec'n, in dower, containing nothing to entitle the demandant to damages, to take a writ of enquiry

Fall Term  
1833.

*Taylor*  
vs.  
*Brodrick.*

A judgment for dower, according to the value of the land at the time when it was conveyed by the husband, is erroneous.

If the value of land is enhanced by improvements made by the tenant, under a *bona fide* purchase from the husband, the widow will be endowed of so much only as will be equal in value to  $\frac{1}{3}$  of the land independent of those improvements. — If there is no such increase of value, the judgment will be for  $\frac{1}{3}$  of each parcel. — If the tenant relies on his improvement of

But, nevertheless, as the default entitled the demandant to a judgment for dower in the lots, and there was no verdict or judgment for damages, the finding by the jury, should be considered as only an unmeaning and inoperative expletive; and therefore, the judgment is as good as it would have been, had it been pronounced, as it might and regularly should have been, without the enquiry by the jury, about matters respecting which there was no proper occasion for such an enquiry.

*Fourth.* The only remaining question is, the propriety and sufficiency of the judgment.

The proper mode of rendering a judgment for dower has been settled by this court, in the case of *Waters vs. Gooch*, *Manuscript Opinion of Fall Term, 1832.* The judgment in this case is not as formal as it might have been. But the only substantial objection to it, is, that it directs an allotment according to the value of the lots "at the date of a conveyance by David S. Brodrick." Had such a qualification been proper, the time to which the assessment was to have reference should have been fixed by the judgment, and not have been left to the *arbitrium* of a sheriff, governed altogether by facts *in pais*. The conveyance by Brodrick does not appear, nor is it identified. But the restriction as to time, was not authorized by any thing in the record.

If the appellant be a *bona fide* alienee, and had, since his purchase, made improvements which enhance the value of the lots, the appellee would be entitled to dower in only so much of the lots thus improved, as would be equivalent to one third of their value at the time of allotment, had there been no melioration. Such seems to be the settled American doctrine. See 4 *Kent's Com. 2nd edition*, 67-8, and the cases there referred to.

If the value of the lots has not been increased by such ameliorations, the measure of the appellee's dower would be one third of each lot as it stands at the time of admeasurement. And such should have been the judgment of the court, unless it had been shewn that the value of the lots, or of some one or more of them, is increased by the labor or money of the appellant, as a *bona fide* alienee from the husband of the appellee. But



there is not even an intimation in the record, that any one of the lots has had any such augmented value imparted to it. And consequently, as the appellee claimed one third of the lots, and that claim has not been, to any extent, resisted, or in any way modified by proof, the proper judgment would have been for one third of the lots, without any qualification or restriction. Had the lots, or any of them, been enhanced in value by the appellant, as a purchaser from the husband, it was his duty to aver that fact, and thus have shewn, that the appellee was not entitled to as much as she claimed. Had he filed an appropriate plea for that purpose, and the appellee had not replied to it, the judgment should have been according to the plea; or had an issue of fact been concluded, a jury should have been empannelled to try it, and should have ascertained, from proof, the value of each lot as unimproved, and the value of each as improved, (*since the alienation from the husband,*) and thus fixed the true standard for admeasurement of dower:—for example, if they found that a lot had been improved by the appellant, as a *bona fide* alienee from the appellee's husband, and had ascertained that, without such improvement, it would be worth one thousand dollars, but that, as thus improved, it was worth two thousand dollars, the appellee should be endowed of one sixth, instead of one third, and the judgment should be, that the sheriff assign to her, by proper metes and bounds, one sixth in value of the land so improved—equal to one third without such improvement. *The proportion of value to be allotted for dower, must be fixed by the judgment;* and whenever it shall be less than one third, in consequence of improvements, it should be ascertained in court, upon a proper issue, or in consequence of an appropriate plea.

We therefore conclude, that the judgment of the circuit court is erroneous, and that the error *may* operate injuriously to the appellant. The judgment must be reversed, and the case remanded.

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1833.

Taylor  
vs.

Broarick.

the property, he must plead it; and the facts must be tried by a jury, who determine what portion of the property in its improved state, will be equivalent to it without the improvements: for which, to be allotted by metes and bounds by the sheriff, the widow will have judgment.

Judgment reversed, because it *may* (tho' it does not appear that it will) operate to the injury of the appellant.

Fall Term  
1833.

## ARBITRATION

*Coghill et al. vs. Hord.*

[Mr. Beatty and Mr. Haggin for Plaintiffs : Mr. Hord for Defendant.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

October 9. Judge NICHOLAS delivered the Opinion of the Court.

**Reference.** THERE being a controversy between the parties to this suit, about the proprietorship of a tract of land and other matters pertaining thereto, they agreed to submit the same to arbitration, and with that view, united in a petition to the circuit court, which made the reference accordingly.

The arbitrators returned an award, in substance as follows :—

**The award.** That partition be made between the parties, in which the Coghills were to have two thirds of the whole tract secured, agreeably to its intrinsic value, subject to a deduction of sixty six acres and two thirds; and that the residue be allotted to Hord. In making partition, the share of Hord to be so laid off as to cover the parcels of land which he has sold &c. unless his sales shall exceed his quantity. If his sales shall exceed his quantity, then it shall be submitted to the Coghills to elect on which of the parcels sold by Hord, their share shall lie, so far as may be necessary to give them their quantity. Or if the Coghills shall prefer to take money instead of land, so far as their share may fall on parcels sold by Hord—then we award that Hord shall pay the value of such parcels. We also award that each party shall pay their own costs.

**Exceptions.** Various exceptions were taken by Hord, both to the sufficiency of the original submission, and of the award, and also to the proceedings of the arbitrators.

**Award set aside in the circuit ct.** The circuit court having quashed and set aside the award, the Coghills have brought the case here for revision.

In assigning our reasons for affirming the decision of the circuit court, we shall notice only one of the various exceptions taken by Hord. It is that which assails the award on the ground that it is not final, certain and conclusive.

This exception is well taken. Waiving all objection to that part of the award which says the Coghills shall have two thirds of the tract secured to them, without saying how it is to be secured, whether by simple release or conveyance from Hord, or by procuring reconveyances and possession from those to whom he had sold, we think the award defective in not having prescribed a time within which the Coghills should make the election allowed them; or at least in not ascertaining the value in money which they are allowed to take in lieu of the land conveyed by Hord.

This case is wholly unlike those we have been referred to in support of the award. We know of no case which sanctions an award as final, that leaves for future adjustment any thing that does not lie either in computation or admeasurement. None goes so far, nor would we feel inclined to follow any such, if such there be, as sanctions the leaving to future adjustment, a matter so wholly uncertain as that of the value of property, ascertainable merely by the opinions of witnesses.

The order, quashing the award, must be affirmed, with costs.

Fall Term  
1833.

*Curd &c.*  
vs.  
*Lewis.*

An award must be final, certain and conclusive, or it may beset aside.

Award, that a party shall have land secured to him, or have its value in money, at his election: this is not certain and final.—The time in which to elect ought to have been limited, and the value of the land in money, ascertained.

An award that leaves any thing for future adjustment, (otherwise than by computation or measurement, cannot be sustained.

## Curd and Others *against* Buford Lewis.

CHANCERY.

[Messrs. Morehead and Brown for Plaintiffs: Mr. Crittenden and Mr. Haggins for Defendants.]

14 351  
116 289  
14 351  
116 289

FROM THE CIRCUIT COURT FOR MUHLENBURG COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 10.

At the instance of the defendant in error, the chancellor below decreed a rescission of a contract for land, which he (defendant) had bought from one of the plaintiffs;

Statement of the case.

Fall Term  
1833.

*Curd &c.*

vs.

*Lewis.*

(Prince,) and perpetuated injunctions which had been granted against two judgments, which had been obtained by others of the plaintiffs, against the defendant, for parts of the consideration of the land; and on cross bills, which they had filed against the assignor (Prince) decreed, also, in their favor, against him, the sums thus enjoined by the defendant.

This writ of error is brought to reverse the decree rescinding the contract, and perpetuating the injunctions.

Several objections are urged against the decree.

Papers not admissible were read at the hearing of a chancery cause; but their only effect was to prove facts amply established by other evidence—the cause is not reversed for that error.

*First.* On the hearing of the cause in the circuit court, papers, purporting to be copies of bonds for titles to the land sold by Prince to Lewis, were read, although their admissibility was objected to; and the plaintiffs contend, that the court erred in admitting them. That those documents were not such as the defendant had a legal right to use on the trial, this court does not doubt. But the equity of the defendant would have been as available without them as it was with them. There was ample proof, that a sale of the land was the consideration of the notes; and the only object of using the copies of title bonds, was to shew that there had been a sale. That fact was indisputably established by other and competent evidence.

Former suit for the same cause.

*Second.* It appears, that another suit in chancery, between the same parties, and probably for the same purpose, had been instituted by Lewis, long prior to the commencement of this suit, and had been in progress several years, when, a short time before the filing of the bill in this case, the injunctions to the judgments now enjoined, had been discharged, for want of a proper preparation, in reasonable time; and two of the answers averred, that that suit was still pending, when they were filed. Upon this ground, the counsel for the plaintiffs in error insist, that the circuit court erred in not dismissing the bill in this the last suit.

The pendency of a prior suit in chancery, between the same parties, for the same cause, may be pleaded in

The pendency of a prior suit in chancery may be pleaded to the prosecution of a subsequent suit in chancery between the same parties and upon the same equity. The ancient practice was the same, when a suit at law, and a bill in equity for the same cause, were pending at the

same time. But the modern doctrine is, that the pendency of a suit at law cannot be pleaded to a bill in chancery; but that the only proper course to prevent vexation in such a case, is, after answer, to apply to the court to compel the complainant to elect to proceed either at law, or in equity. The pendency of two bills, for the same cause, and between the same parties, is, however, still a good plea.

But in this case, the parties have not presented this matter in the proper mode. They did not plead the fact, but relied on it incidentally, among other defences on the merits, in their answers. They made no motion to dismiss the bill. They took no step for obtaining a decision on that, as a preliminary question. They have not even filed the bill in the first suit. Moreover, this suit was prepared for a hearing on the merits, and was so heard by consent. Hence, it is evident that the objection now urged, cannot be sustained. Had the question been presented in a proper manner, and urged at a proper time, the chancellor would have decided it before the case was prepared for a hearing on the merits; and, if he had ascertained the facts to be as averred, he would either have dismissed the last bill, and left Lewis to prosecute his first alone, or, had there been any material defect in the first bill, he might, if it were pending in his own court, have dismissed that, and, upon the payment of costs by Lewis, have required answers to the last bill. *Cooper's Equity*, 275. *Milford's Pleading*, 199. But after this suit had been submitted for hearing upon the merits, and especially by consent, and after the first bill had probably been dismissed, it would not be consistent with equity, or with chancery practice, to regard the allegations as to the pendency of another bill. There could be but one available decree, and it is not material in which case it was pronounced.

**Third.** The vexatious delays in the first suit, (enjoining the judgments,) and the dissolution of the injunctions in that case, are urged against the equity of perpetuating the injunctions to the same judgments, in this case. It may be admitted, that the judgment creditors have been

not, in general, sufficient grounds for denying to the complainant the relief to which he shows himself entitled, in a new suit upon the same equity. Should an assignor become insolvent in the mean time, and the assignee thus lose by the delay, the circumstance would be entitled to consideration.

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chancery. The pendency of a prior suit at law cannot be pleaded in chancery; but the plaintiff may be compelled to elect which he will proceed with.

The pendency of a prior suit must be presented, by plea, or motion to dismiss, as a preliminary question. As an incident, among other matters, in an answer on the merits, it will not avail. When this defence is duly made and established, the chancellor will dismiss the bill; or, if the prior suit be in his court, and defective, he may order a dismissal of that, and permit the complainant to proceed on his new bill. *Consent* to a hearing, waives the defence of a former suit pending.

Extraordinary, inexcusable delay in preparing a cause, and consequent discharge of the injunction, are

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unreasonably harrassed by delay, and by anomalous proceedings. After the judgments had been enjoined five years, by the first bill, and the injunctions had been, at last, discharged, because the alleged equity had not been maintained by proof, it was certainly irregular to enjoin the same judgments again, by a new suit, and upon the same grounds. Nevertheless, that which was so irregular and unjust, when it occurred, cannot, of itself, defeat Lewis' right to a final decree rescinding the contract, and perpetuating the injunctions, if, upon the hearing of the cause, such decree was otherwise clearly authorized by the allegations and proofs. This case should now stand just as the first suit would have stood, had the injunctions been reinstated in that, upon a supplemental bill, instead of being, as they were, granted in this, upon an original bill. Inexcusable delay in the preparation of the suit, might have some effect against a questionable equity, especially if the vendor and assignor (Prince) became insolvent since the judgments were first enjoined. But, as that fact is not established, there would be no utility in enquiring whether it could have had any essential influence upon the question of rescission claimed in consequence of a want of title in the vendor, as must be inferred from the record as now presented.

*Fourth.* It is argued, that the proper parties were not made; and in support of that position, it is said, that Prince was not a party. Prince was a party. The subpoena was returned, executed on him; and, as he failed to answer, the bill was properly taken for confessed against him.

To the cross bill of the assignee of a note,—whose judgment on the note is enjoined, upon an equity against the obligee,—for indemnity, his immediate assignor is a necessary party.

But Henry K. Lewis, an assignor of one of the notes, was not made a party, and did not answer, nor (as far as can be inferred *judicially*, from the record,) enter an appearance. He should be deemed a necessary party in such a case. He was evidently interested in the controversy, and might possibly be injuriously affected by the decree. It is true, that there is no decree against him, and that the first assignor, Prince, has been substituted in his place, by the decree. But, as Prince was not before the court, so far as the cross bills were concerned (there having been no service of process upon him, except upon

the original bill,) the decree against him, upon the cross bills, may not secure Henry K. Lewis against eventual responsibility upon his assignment, in consequence of the decree rescinding the contract, and perpetuating the injunctions.

Although the decree rescinding the contract, could not conclude Henry K. Lewis; yet, for that very reason, it might lay the foundation for litigation between him and his assignee, in which the facts involved in this suit, could be again tried, and might be so decided as to place the assignee in a condition in which he must sustain an irreparable loss. It is the duty of the chancellor to prevent such consequences, and such a multiplicity of suits, whenever it can be done by requiring all who may be thus interested, to be made parties, so that the whole controversy may be finally and safely adjusted in one suit.

Decree reversed, and cause remanded; and, as Henry K. Lewis is a party to the writ of error, it will not be necessary to issue any process against him in the circuit court.

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## Caldwell vs. Roberts.

ASSUMPTIT.

[Mr. Cunningham, and Messrs. Wickliffe and Wooley for Appellant: Mr. Crittenden and Mr. Monroe for Appellee.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court:

October 9.

THE Bank of Kentucky recovered a judgment against McChord, Caldwell and Roberts. McChord was the principal, Caldwell and Roberts were his sureties. An execution in favor of the Bank was levied on sundry slaves, as the property of Roberts. They were sold by the sheriff, and purchased by William T. Caldwell, on the 23d of June, 1827, for one thousand one hundred and six dollars twenty five and a half cents. On the same day, Roberts receipted to Caldwell, the appellant,

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for three hundred forty two dollars ninety seven cents, "in part for what he stands indebted to me, in the case of the Bank of Kentucky against John McChord, Caldwell and myself—my negroes having, this day, been sold to pay the whole debt."

Roberts instituted this action of assumpsit against his co-surety, Caldwell, for the purpose of recovering a moiety of the debt paid by the sale of his negroes. He obtained a judgment for two hundred seventy two dollars fourteen and a fourth cents, on the 18th of May, 1832. Caldwell has appealed.

Caldwell insists that no recovery should be had against him, because, as he alleges, and as the facts are, Roberts voluntarily surrendered his slaves, and was anxious that they should be sold under the execution, and purchased by William T. Caldwell, the father-in-law of both McChord and Roberts, and the father of the appellant, with a view to exempt them from other apprehended liabilities as surety; and because the slaves, after the death of William T. Caldwell, had been restored to Roberts, by one of the executors, without Roberts paying any part of the debt for which the slaves had been executed and sold, otherwise than by the sale of the slaves.

The slaves of a debt in an execution, who was a surety for the debt, were levied on, sold, and purchased by his father in law; who, dying, devised to his daughter, for life, the slaves he had given her possession of; under this devise, the defendant received the same slaves that had been sold under the execution: held that he thereby acquired a new and different title, not a restoration of what had been taken from him by the levy, so as to exonerate a co-surety (who was bound to contribute) from his liability to reimburse the owner of the slaves, for half the amount they sold for.

It seems that William T. Caldwell made his will on the 14th of July, 1827. It was proved and admitted to record in the August following. By a clause in the will, the testator "gives to his daughter Mary Logan Roberts, during her life, all of the negroes and other property he had given her possession of, and a grown negro girl, at his death, out of his estate, and her equal dividend at her mother's death." It does not certainly appear, that the slaves which Roberts surrendered for sale under the execution, were slaves which he obtained by his wife, the testator's daughter. Such presumption may be indulged, and therefore it may be inferred, that the executor gave up the slaves, purchased under the execution to Roberts, as passing under the above clause of the will, falling within the description of *negroes which the testator had given his daughter Roberts possession of*. Under this view of the transaction, Roberts acquired, at most, under the will, a life estate in the slaves. If he



owned the fee simple at the time they were levied on, the nature of his estate has been changed by the sale. He has surrendered a fee simple, for a life estate. This must be regarded as prejudicial to him ; and hence, there is no ground for viewing him in the attitude in which the appellant would place him : to wit, as the seeker of contribution from a co-surety, when he had sustained no loss. Roberts made out ample consideration upon which to recover.

It is objected that Roberts could not recover against Caldwell, his co-surety, without first prosecuting McChord, his principal, to insolvency by legal process. There is nothing in the objection. The liability of sureties to contribute, attaches as soon as one of them is obliged or compelled to pay the debt. Were the surety paying the debt required to wait until he prosecuted the principal to insolvency, the consequence might be the exoneration of his co-surety by lapse of time. The co-surety might become insolvent pending the litigation. By such means and doctrines, a total loss might fall on the surety paying the debt, which it is the object and policy of the law to prevent.

It is said that the verdict and judgment are for too much. The half of the sum for which the slaves sold, is five hundred fifty three dollars twelve and three fourths cents. Deduct from this sum the three hundred forty two dollars ninety seven cents, paid by Caldwell to Roberts, on the day of sale, and there will remain two hundred ten dollars fifteen and three fourths cents, which, with interest up to the date of the verdict, should have limited the extent of Roberts' recovery. Tested by this criterion, the verdict and judgment are for seventeen cents too much. This excess is of such a character, that the maxim *de minimis non curet lex* embraces it. The costs of a new trial would probably amount to twenty times as much, and before the ensuing term, the interest accruing would have exceeded it more than eighteen times. See *Luckett vs. Clark and Anderson*, Litt. Sel. Ca. 180; and *Smith vs. Surber*, 2 Marsh. 450.

Judgment affirmed, with costs and damages.

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If one of several sureties is compelled to pay the debt, or any part of it, the co-sureties are immediately liable to him, for their due proportions. He is not bound to pursue the principal, before he has recourse to them.

A verdict and judgment being for a mere trifle (17 cents) too much, is not sufficient ground for a new trial, or reversal: *de minimis non curet lex*.

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COVENANT.

## Fowler *et al.* vs. The Commonwealth, for the use of Taylor.

[Messrs. Sanders and Depew for Plaintiffs: Messrs. Morehead and Brown  
for Defendant.]

FROM THE CIRCUIT COURT FOR CAMPBELL COUNTY.

October 10. Chief Justice ROBERTSON delivered the Opinion of the Court.

Grounds of the  
action.

THIS is an action of covenant against a sheriff and his sureties, for an alleged breach of his official bond, in his failing to account for fee bills, which he had received for collection from Taylor, as clerk of the circuit and county courts of Campbell county.

The assignment of errors presents only two questions worthy of consideration: *first*, the sufficiency of the declaration; *second*, the sufficiency of a plea, No. 5.

Clerks are to put their fee bills into the hands of the sheriff, for collection, before the 1st of April, annually; and then the sheriff is bound to account for them, on or before the 1st of October following. If the sheriff receives them after the 1st of April, he may be required to account, in a reasonable time

The declaration avers, that the fee bills were received by the sheriff, on the 22d of September, 1825, and that he "*had not accounted for, and paid them, at such time, and in such manner, as is directed by law.*" No sufficient breach is assigned. The law made it the duty of the clerk to deliver his fee bills to the sheriff before the 1st of April; and also made it the duty of the sheriff, when the fee bills had been *thus* delivered, to account for, and pay the fees, on or before the 1st of October succeeding the delivery.

Although the sheriff and his sureties may be liable for fee bills which he voluntarily received for collection when he was not bound to receive them, nevertheless, they are not responsible for his failure to account for, and pay the fees, "*on or before the first of October*"—or (what is the same thing) "*at such time as is directed by law*"—which is "*on or before the 1st of October*" succeeding the delivery by the clerk. There is no averment that the sheriff failed to account for, and pay the fee bills in a reasonable time.

Where a sheriff received fee bills for collection *after the 1st of April*, and is sued for failing to account, an averment that he

Wherefore, the declaration does not shew that the sheriff had been guilty of any breach of official duty, or of any implied, or express, undertaking.

It may not be improper to suggest, that the record shews, that the sheriff undertook to account for the fee bills within six months.

Plea No. 5 avers, that the fee bills "were on persons who were insolvent, and also on persons who were non-residents of the county of Campbell." It does not aver, that *all* the persons were either nonresident or insolvent; nor that none of the fees were, or could have been, collected by the sheriff. The plea is insufficient because, admitting every allowable deduction from it, a cause of action may, nevertheless, have existed.

Judgment reversed, and cause remanded, with leave to amend the declaration.

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did not pay &c.  
"as directed  
by law," being  
merely tanta-  
mount to an a-  
verment that he  
did not pay &c.  
by the 1st of  
Oct. is no suf-  
ficient breach.

A plea, which  
may be taken  
as true, and yet  
some cause of  
action remain,  
is bad.

## Million vs. Riley et al.

EJECTMENT.

[Mr. Owsley and Mr. Caperton for Appellant : Mr. Turner for Appellees.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 10.

**THIS** is an appeal, by Million, from a verdict and judgment in ejectment, rendered against him, in favor of the appellees, in 1832.

Verdict and judgment in ejectment, and appeal.

On the trial, it was proved by the plaintiffs, that, about forty years before, Isaac Burgen took possession of, and improved the land in contest. After his death, the possession was continued by his four children and heirs, till between 25 and 30 years before the trial ; when Charles Burgen took possession, claiming it as his own, under the heirs of Isaac Burgen, and that he held it until 1823, when Million took the possession, under an executory contract of purchase from Charles Burgen ; and had retained it ever since. On the 16th of June, 1826, several

Evidence in the court below ; — decision of that court, rejecting a deed, approved.

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executions, in the names of different persons, against Charles Burgen, were placed in the hands of the sheriff, which he levied on the land in contest, on the 5th of August, 1826, and thereafter sold and conveyed it to Riley, the lessor of the plaintiff, as the property of Burgen.

The defendant then gave in evidence a patent for the land, to Henry Fields, and a bond from Burgen to Million, therefor, executed in 1823. He also produced, and offered in evidence, a deed, for the land, to him, from Charles Burgen, executed on the 22d July, 1826, avowing his object to be :—*first*, to shew that, in compliance with the bond, the legal title had been transferred to him before the levy or sale under the executions, and that therefore nothing passed by the sheriff's sale and deed to Riley. *Second* : to shew, by other evidence, that, before the executions emanated, Riley had notice of Million's purchase, and that he had paid for the land. *Third* : to shew that, at the time of the sheriff's sale, he was in the adverse possession of the land, claiming it under the deed ; and for the further purpose of shewing the extent of his possession. The court refused to permit the deed to be read, and, as we think, properly.

As soon as an ex'on comes to the hands of the sheriff, the defendant's estate is in lien for the amount ; and if he convey land which is afterwards levied on and sold under the ex'on, the sale by the sheriff, has relation back to the time when the execution came to his hands, overreaches that made by the defendant, & passes the better title.

The executions having come to the sheriff's hands before the conveyance from Burgen to Million, they thereby obtained a prior lien, which necessarily caused the subsequent sale and conveyance to Riley, to overreach and avoid, by relation, the conveyance to Million. Such has been the uniform effect given to subsequent levies and sales under executions, when they came to the hands of the officer prior to the alienation of the defendant. This is most obviously indispensable, in order to effectuate the lien in favor of the execution, secured by statute, from the time it reaches the officer's hands.

This case, however, is attempted to be distinguished from the ordinary one, inasmuch as the defendant, by his conveyance, was merely effectuating a prior sale, made long before, and which he was legally and morally bound and compellable to do. This might have constituted a reason with the legislature, for allowing the distinction contended for ; but as this has not been done, we cannot take upon ourselves to create it, in the ab-

The land which a defendant in an ex'on was bound to convey, is not ex-

sence of all expressions in the statute to authorize any such restriction of the lien allowed to executions.

Neither could it avail the defendants any thing, to prove, in this action at law, that Riley had notice of his purchase. If it places him in such an attitude as will induce the chancellor to make him surrender the legal title to the defendant, still for the purposes of this suit, it does not divest the title, nor did it obstruct him from obtaining it, through the sheriff's sale and conveyance.

Whatever was the character of the possession held by Million at the time of the levy and sale, can have nothing to do with their validity. At the time the lien attached, the possession was amicable, and it is to that time, that the sale has relation. Its validity must be tested by matters as they then stood.

We cannot perceive any purpose of substantial benefit to the defendant, in using the deed to prove the extent of his possession. It did not conduce to shew, that he was not in possession of any part of the land sued for.

It is further contended, that the deed was admissible for the purpose of placing the defendant in the attitude of a purchaser, and enabling him, as such, to contest the validity of the sale to Riley, on the ground of fraud on the part of the creditors, in having their executions levied on this property, which it is insisted the jury might have inferred. But we see no room for any such inference. There was no proof to authorize it.

A deed from Field, the patentee, to Isaac Burgen, and another from three of the four heirs of the latter to Charles Burgen, for the land in contest, were read in evidence; and it was proved, that the four heirs of Isaac Burgen are still living, and that they were all of age twenty years before the trial.

Upon this proof, the court instructed the jury, in effect, that if Million acquired the possession under an executory contract of purchase from Charles Burgen, he was estopped from denying that the title was in Burgen, and that the proof, if believed, shewed a right to recover. It refused to instruct the jury, at the instance of defendant, that, under the proof, they should find for the plaintiff only three undivided fourth parts of the land.

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empt from the  
lien of the execution.

Notice of an equity does not effect the rights of a party in a trial at law.

Not error to reject a deed which offered merely to prove the extent of defendant's possession, as it could not show that he was not in possession of the land sued for.

Further evidence and instructions, in the court below.

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The circuit court has been justified, in argument, for the giving and refusing these instructions, mainly on two grounds : viz. the right of the jury to presume a conveyance from that heir of Isaac Burgen from whom no conveyance was produced, and the estoppel upon Million to deny Charles Burgen's title.

Grants, which, according to the books, may be presumed after twenty years possession, are grants of incorporeal hereditaments. If a grant of a fee simple estate can ever be presumed, it cannot be, upon a possession of less than thirty years.

We do not concur with the counsel entirely in these views. There was no contract of purchase proved between Charles Burgen and the heirs of Isaac Burgen, other than that evidenced by the deed executed by three of them, in 1816. Nor is there any other circumstance in proof, from which the jury might infer a conveyance from the other heir, upon a possession of twenty years. Grants are presumed after twenty years possession, as we are told by the books ; but they are a species of conveyance technically applicable to incorporeal hereditaments alone; and the books are so to be understood when treating on this subject. These presumptions in favor of incorporeal hereditaments, are created by the courts, in analogy to, and in aid of, the statute of limitations, bringing within its operation a large class of cases not embraced by its letter, and which otherwise would not receive the benefit of its protection. But if a conveyance of the entire fee simple, from the true owner of real estate, can ever be presumed from mere length of possession, without other circumstances to aid the presumption, it cannot be in less than thirty years. To presume a deed in less time, would manifestly confound all distinction between the different periods allowed for making entry, and bringing a writ of right. Peaceable enjoyment of real estate for twenty years, claiming it as one's own, is no doubt *prima facie* evidence of absolute and rightful ownership. But, like all such evidence, it remains good only until the contrary is shewn. It is very different in its effect from the presumption of a conveyance from the true owner, which is measurably susceptible of disproof.

If the instruction had been, as counsel seem to treat it, and as the court probably intended, that, as Million en-

A party in possession of land is estopped to deny the title of him under whom he entered. But where the land is claimed under a sheriff's deed, the tenant is not estopped from shewing, that the title of the defendant in the execution, was only equitable, and was not subject to sale under execution.

tered under an executory contract with Burgen, he was estopped to deny Burgen's title, it could not have been caviled with. But the instruction is, that Million was estopped from denying, that the title was in Burgen, which differs materially from the other. Burgen himself, if he had been in the actual possession, would not have been estopped from shewing, that he had not a legal or even vendible title to the whole or any part of the land. Neither, therefore, can another holding under him, as Million did, be estopped. It would have been perfectly competent for either of them to have shewed, that Burgen held the whole, or any part, by executory contract merely.

But as there was no such proof made, we do not think the case should be reversed for such verbal inaccuracy in the frame of the instruction. It must be understood, as, not inhibiting the making of proof, but the improper use of the proof made. The bill of exceptions states, that it was proved, "that Charles Burgen came into possession under Isaac Burgen's heirs, and continued in possession of the land, claiming it as his own, until 1823." This is the whole statement of the proof as to the manner of his holding. There is nothing in it, which indicates that he looked to Burgen's heirs for the title. The statement is, that he held, claiming it as his own.

Though a defendant in an execution is not estopped to shew the nature of his title, in order to manifest that it is a mere equitable one, or otherwise not vendible under execution, yet, we deem him estopped from shewing a superior outstanding title in another, merely for the purpose of defeating the recovery of the purchaser under an execution, without manifesting any connection between him and such title. It is not necessary that the purchaser should have the superior legal title, to enable him to recover from the defendant in the execution. It is enough that the title of the defendant, such as it was, good or bad, was vendible, and that the purchaser has acquired it. A contrary doctrine would subject purchasers, often times, to infinite trouble and inconvenience. To deduce title from the patentee, by regular legal proof, is generally accompanied with much difficulty; and it

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*Riley et al.*

This court will consider the instructions of the inferior court, with reference to the evidence before that ct. when they were given, and if the instructions can be sustained so far as there was evidence to which they were applicable, will not reverse, tho' they might be erroneous if taken literally.

A defend't in ejectment, whose title, or whose vendor's title, was sold under execution, will not be permitted to show that there was an outstanding title paramount to that of the defendant in the ex'n, in order to defeat the action of the pltf. claiming under the sheriff's conveyance.

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*W. Johnson's  
heirs &c.*

may well happen, that the knowledge of the mode of doing it, is locked up in the defendant's own breast. On the other hand, we can perceive no injury, inconvenience or injustice, that can ensue to the defendants, from the rule here prescribed. He has, or is justly presumed to have, full knowledge of his own title and its mode of derivation. If it is a mere equitable one, or one which, from any cause, is not subject to execution, he ought to be able to shew it, and will not be estopped from so doing. The burthen of the proof properly rests on him.

Taking the instruction, therefore, as speaking in reference to the case as it then stood before the jury, it meant nothing more than that the defendant was estopped from relying upon the superior title shewn to be in one of the heirs of Burgen, to defeat the plaintiff's recovery, to the extent of an undivided fourth of the land. With this understanding, we do not think the instruction given, is liable to just exception, or that the court should have given that asked by the defendant.

The judgment must be affirmed.

CHANCERY.

### Johnson and Payne *against* William Johnson's Heirs and Others.

[Mr. Haggin for Appellant : Mr. Chinn and Messrs. Wickliffe and Wooley for Appellees.]

FROM THE CIRCUIT COURT FOR SCOTT COUNTY.

October 12. Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the  
case.

THE heirs of William Johnson, deceased, filed a bill in chancery against James Johnson, who had been their guardian and the administrator of their father's estate, and also against his sureties for a settlement of his accounts. Afterwards, they filed an amended bill, in which they alleged that the legislature of Kentucky having, in the session 1817-18, passed an act authorizing their said guardian to sell all or any of the lands which had descended to them from their grand father, Robert John-



son, he afterwards, pursuant to said act, sold their interest in a tract of land on the Ohio river, and gave a bond for the title. They therefore prayed a decree against him, on that account, and also against John Payne and John T. Johnson, who, as the amended bill alleged, had become his sureties in a bond executed in the county court of Scott county, conformably with the requisition of the act of assembly, for their indemnity for any land which might be sold in virtue of the authority vested by the act. They also made William and Simon Robertson, who bought the land, defendants, and prayed for a restitution of their land, unless they should be able to get the consideration.

James Johnson having died, they also prayed a revivor against his heirs, alleging that, though he had been dead more than a year, no administrator had been appointed.

James Johnson's heirs did not answer the amended bill.

John T. Johnson answered, and resisted any decree against himself, on three grounds:—*first*, because, as he insisted, James Johnson had never sold any interest of the complainants in land, but that he had sold his own joint and personal interest only:—*secondly*, because, as he contended, the bond which he and John Payne had signed, in 1818, as the sureties of James Johnson, was only an ordinary guardian's bond, and did not, therefore, bind them for more than fidelity in discharging the ordinary duties of guardian; and, *thirdly*, because the name of Joel Johnson, who, as a joint obligor, (together with James Johnson and W. Ward,) had subscribed the bond for a title to the land sold to William and Simon Robertson, had been without his (J. T. Johnson's) knowledge or consent, or the knowledge or privity of James Johnson, erased, and that, therefore, the bond had become a nullity.

The Robertsons made their answer a cross bill; alleged that they had bought the entire title to the land, and had paid to James Johnson the whole price, and therefore prayed for a title, or for a restitution of the money which they had paid.

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vs.  
W. Johnson's  
heirs &c.

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vs.

*W. Johnson's  
heirs &c.*

William Johnson's heirs, in their answer to the cross bill, consented that a conveyance should be made to the Robertsons, upon condition that they (the heirs) should be paid the consideration.

Payne and John T. Johnson, in their answers, resisted any decree against them, for any portion of the consideration, chiefly on the grounds already suggested, as being contained in the answer of John T. Johnson.

By consent of parties, a conveyance was made to the Robertsons, subject to the final decree on the hearing of the cause.

Decree of the  
circuit court.

By the decree afterwards rendered, on the cross bill, that title was virtually confirmed, and James Johnson's heirs, and John Payne and John T. Johnson, as the sureties of James Johnson, were directed to pay to William Johnson's heirs the amount which, as the court supposed, James Johnson had received for their interest in the land sold to the Robertsons.

Appeal.

To reverse that decree, this appeal is prosecuted by Payne and John T. Johnson only.

Any one of several against whom a decree, or judgment, is rendered, may appeal. Such appeal brings up the whole case, and the appellant is liable for the whole, by his appeal bond.

In a writ of error, all must unite, but if any are unwilling to incur the risque of costs & damages, they may have a severance, and be exonerated from that liability.

Bond for conveyance, and its construction.

The appellees object that the appeal cannot be sustained unless all those against whom the decree was rendered, had united in the appeal. This objection cannot be sustained. Certainly, it would be more regular for all to unite in the appeal. But any of them had a right to appeal. There is this difference between an appeal and a writ of error: all against whom a judgment is rendered must unite in a writ of error to reverse it, and if any of them desire to be exonerated from costs and damages incident to an affirmance, they may have a severance. But any one of several, against whom a joint decree is rendered, may appeal, and by his appeal bond, becomes responsible for the whole decree, and takes it all up by his appeal.

We will, therefore, proceed to consider other points involved in the merits of the case.

*First.* The bond given to the Robertsons for a title is as follows:—"Georgetown, August 26th, 1818—We have this day sold to Simon Robertson and William Robertson, our interest in the tract of land on the Ohio river, in Gallatin county, Mosby's bottom, the same being five hundred and seventy acres, be the same more or

less, for the consideration of thirteen thousand dollars ; for which sum, notes are now given ; and peaceable possession is to be given to the said Robertsons, on the 15th day of March next ; at which time the first payment is to be made ; the deed is to be a general warranty, and to be made when the last payment is completed, which is in two years after the first payment. Witness our hands and seals, the date above.

JOHN T. JOHNSON, (Seal)  
*Attorney in fact for James Johnson.*  
 (Name torn out.)

Test—*Sebel Offutt.*

W. WARD, (Seal)

*For himself and heirs of Sally Ward, deceased."*

It seems that the tract of land thus described, had been allotted to James Johnson, Joel Johnson, the heirs of William Johnson and the heirs of Mrs. Ward, the wife of William Ward, who had also been authorized by an act of assembly, to sell the land of his children ; and it appears, also, that Joel Johnson had signed the bond, but that, afterwards, he and the Robertsons rescinded the contract as to his interest, and thereupon erased his name and seal.

Whatever may have been the actual intention of the parties, the bond cannot with propriety be construed as importing any thing more, than that James Johnson sold his own individual interest only. The description of quantity, and the covenant to give possession, and make a general warranty deed, are not inconsistent with this interpretation, but may mean only, that they had a joint interest in the tract of five hundred and seventy acres, of which they would give possession, and for which they would make a conveyance by deed of general warranty. James Johnson is not described as guardian, nor is there any intimation in the bond, that he, any more than the other covenantors, sold any thing but his own interest. We presume that, had William Johnson's heirs been disposed to withhold their interest, there is nothing in the bond which could have divested them of it. Nevertheless, if their guardian, under the authority of the act of assembly, actually sold their interest, even by a verbal contract, and they are willing to carry that

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 heirs &c.

A guardian and his wards, with others, are joint owners of a tract of land ; he is authorized by an act of assembly to sell their real estate ; he (with others) signs a bond, the tenor of which binds those who sign it to convey 'our [their] interest' in the land, give possession and a general warranty deed : held, that this bond (signed by the guardian without referring to his fiduciary character) imposed no obligation on him, or his wards, to convey their title.

If the tenor of a guardian's bond is such as to hold him accountable for the proceeds of the real estate of his wards, which he was authorized to sell, the manner of the sale is immaterial : if it be even by verbal contract, and he receives the money, and they are willing to confirm the sale, he and his sureties will be answerable on the bond.

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vs.

*W. Johnson's  
heirs &c.*

If an agent sign his own name, with *descriptio personis* added, (as J. T. J. attorney in fact for J. J.) to a bond for a conveyance: though this is but the bond of the agent, yet, if he was authorized to bind the principal, the latter may be held, *in equity*, to a specific execution.

An ordinary bond of a guardian renders him and his sureties liable to the wards for every obligation resulting from acts which he was legally authorized to perform; and if, when the bond was executed, he was authorized to sell the land, it secures the proceeds to them.

contract into effect, his sureties should not be exonerated from liability for the price which he received and failed to account for, if their bond would impose on them such liability for any sale whatever which he could have made.

But the bond for a title is not proof of a sale by James Johnson of the interest of his wards. Nor indeed would it have concluded James Johnson, as to his own interest, unless he had given John T. Johnson authority to subscribe the bond; in which event, though the mode of signing might have made John T. Johnson responsible, yet, in equity, James might have been held to a specific execution.

*Second.* Though the record of the county court in which the bond was acknowledged, in 1818, by James Johnson, as principal, and by John T. Johnson and John Payne, as his sureties, states that the bond was executed pursuant to the special act of assembly, it is, in its style and tenor, an ordinary guardian's bond; and hence the sureties contend that, as an ordinary guardian had no power to sell the land of his wards, and as, by their bond, they were bound only for James Johnson's authorized acts, as a guardian, they are not liable in consequence of any sale which he may have made of the land of the appellees.

This position cannot be maintained. Waiving any consideration resulting from the record of the county court, it seems to this court, that the bond rendered all the obligors liable for any act which the guardian had legal authority to do at the date of the bond. The special act of assembly had superadded to his ordinary power as guardian, the additional right to sell the land of his wards; as guardian, that power was as effectually vested in him, as it would have been, had it been delegated by the general law to all statutory guardians; and, consequently, this bond, executed after the passage of the special act, should be deemed coextensive, in its condition, with his power as guardian, whether that power was conferred by general or special law.

Erasure of an obligor's name.

*Third.* And it is clear, that the erasure of the name of Joel Johnson, cannot effect the liability of Payne and J.

T. Johnson, for any money which James Johnson, as guardian, received for the land of his wards, if he did receive any.

But the case was not properly prepared for a decree on the cross bill. James Johnson's heirs did not answer either the amended bill of William's heirs, or the cross bill of the Robertsons; and some of them being infants, it was improper to render a decree without their answers by guardian *ad litem*. Moreover, they were not made parties to the cross bill, no subpoena having been served upon them. Wherefore, we shall not consider the merits of the cases, so far as they may be liable to be hereafter affected by further preparation and proofs; but must reverse the decree, for want of proper parties, without intimating an opinion as to its propriety or impropriety (upon the facts now exhibited,) if there had been no defect of parties.

It is therefore ordered and decreed by the court, that the decree of the circuit court, on the cross bill, be reversed, and the cause remanded for further proceedings.

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There should be no decree against an infant without answer by guardian *ad litem*.

Defendants to a cross bill (other than comp'ts in the original bill) must be summoned, notwithstanding they may have appeared in the cause, in some other attitude.

Reversal, for want of proper parties.

## Gaither vs. Slaughter.

MOTION.

[Mr. Monroe for Plaintiff: Messrs. Morehead and Brown for Defendant.]

FROM THE COUNTY COURT OF HARDIN COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 12.

THE Hardin county court, in October, 1818, levied one hundred dollars upon their county for the use of Gaither, being the compensation allowed him as county attorney. In December, 1830, Gaither moved the county court of Hardin for judgment against Slaughter, upon his official bond, who was high sheriff and collector of the county levy of 1818, for the above sum. The court dismissed

The motion of a county creditor against a delinquent collector, is not barred by any statute of limitations, nor affected by lapse of time short of 20 years.

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the motion. Two questions are now made for our decision. *First.* Is Gaither's demand barred by lapse of time? *Second.* If it be not, does the evidence shew that it has been satisfied or paid?

*First.* The statute giving a county creditor remedy by motion, against the delinquent collector, does not prescribe any limitation. The act of 1796 "to reduce into one the several acts or parts of acts concerning limitations of actions," contains no provision expressly embracing the case. Nor is there any principle known to us, upon which we could bring this case within the operation of that act. An action of debt founded on the collector's official bond, would not be affected by lapse of time in any manner short of twenty years. The motion is only a different remedy, and we see no reason to restrict it to a period short of that which would allow an action of debt to be successfully prosecuted on the bond.

*Second.* The evidence is not sufficient to shew that the demand has been paid. There are circumstances which, in some minds, may excite suspicion, but they are too weak to shew that the debt has been paid. It was Slaughter's duty to make satisfactory proof of payment. Offers of compromise amount to nothing. The witnesses ought not to have been permitted to state what they heard Samuel Martin say, unless it had been shewn, that Martin was at the time the owner of the accepted order. His statements after returning the order to Gaither amounted to nothing. He should have been introduced as a witness. The testimony of other witnesses as to what he said was no better than *hearsay*. Without commenting further on the character of the evidence, we deem it proper to reverse the judgment, with costs, and to remand the cause for a new trial.

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## Cundiff vs. Zachary's Executor.

MOTION.

[Mr. Cunningham for Plaintiff: no appearance for Defendant.]

FROM THE COUNTY COURT OF PULASKI COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 12.

Commissioners who had been appointed by the Pulaski county court, to settle the executorial accounts of the appellee, having reported a settlement, as made by them, Cundiff, as one of the devisees of Zachary, appeared, and sought permission to resist a confirmation of the report, and to shew from the face of the report, the testator's will and other evidence which he offered to introduce, that the settlement was incorrect and unjust. The court refused him permission to introduce his testimony, or otherwise to resist the confirmation of the commissioners' report, and, as the record states, caused an order to be entered, confirming the report without investigating it. The reason assigned for this singular proceeding, is, that Cundiff had no right to object to the report, without the union and concurrence of the other heirs and devisees of Zachary.

As these *ex parte* statements, when confirmed by the county court, become evidence against all persons interested, and are treated as *prima facie* correct, the plainest dictates of justice require, that any one so immediately and essentially interested as a devisee, should be heard, and permitted to resist their confirmation. That others equally interested do not choose to appear and exercise this right, constitutes no sufficient reason for its being denied to him. If the others could afterwards come in, and demand a reinvestigation, after the report had once been confirmed, there might be some plausibility in requiring that they should all appear at once. But as this could not be done, no reason whatever is perceived why any one of the devisees, or distributees, should not be permitted to protect his interest, by resisting the confirmation, by any legitimate mode of shewing the

The confirmation by the co. ct., of a settlement made by commissioners with an executor, may be resisted by any party interested in the estate, with, or without, the concurrence of others; and every facility should be afforded him for that purpose, by the court — whose duty it is, to scrutinize such accounts rigidly, and require of the ex'or satisfactory proof as to every item objected to, and take care that no unjust or exorbitant charges are admitted.

If any of the parties interested fail to make their objections when the report comes regularly before the court, and until the settlement has been confirmed, they will be precluded.

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ecutor.*

report to be incorrect, or rather of requiring the executor to prove that it is correct. The whole proceeding by *ex parte* settlement, is sufficiently obnoxious to censure, on the score both of justice and policy, without rendering it so manifestly unjust and oppressive, as it would be, if this right were denied to any devisee or distributee. The commissioners, whatever they ought to be, or whatever the law contemplated they should be, are, as it is well known, frequently selected and nominated by the executor himself. Instead, therefore, of shielding their proceedings from proper investigation before they are finally acted upon, the county courts should not only permit, but encourage, a most rigorous investigation of what they have done, and afford every facility to those interested, to falsify and surcharge the accounts reported. Nothing should be allowed merely because the commissioners have reported it. Nothing should be allowed in favor of the executor, except what he can sustain by satisfactory proof before the court, when required to make it by the opposing party.

We cannot but hope, that the justices who sat in this case, have certified, under their seals, something more than the truth against themselves, when they say, they ordered the report to be confirmed without any investigation. We cannot believe that they would have confirmed any account, much less one of the magnitude and importance that this was, without even looking into it. There is no portion of the judicial functions of the county courts, of so high and delicate a trust, as that of passing upon these *ex parte* settlements of executors, administrators and guardians; none which requires a more strict and enlightened vigilance. It is to the exercise of that vigilance and intelligence, that the law looks and trusts, for the protection of widows, infants, and all distributees and creditors generally, against false and fraudulent settlements. The commissioners should always be men of probity and intelligence, selected by the court itself, and not by the executor, and when they make their report, if no one appears to contest it, the court should, by inspection, itself ascertain that every item is



sustained by a proper voucher, and that the charges are reasonable and not exorbitant.

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The order confirming the report must be reversed, with costs, and the cause remanded for further proceedings consistent herewith.

## Frankfort Bank *vs.* Markley.

MOTION

[Messrs. Morehead and Brown for Plaintiff: Mr. Haggin for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 12

On the motion of Markley, the circuit court quashed an execution, sheriff's return, and replevin bond entered into by him to the Bank, on the ground that the original execution, of which the one quashed was a renewal, had been receipted in full, in 1824, by the then agent of the Bank. To rebut this receipt, it was proved that one Duckham, who was the principal in the debt for which Markley was bound, was also indebted to the Bank, in the sum of two hundred and eighty eight dollars, with other sureties, due in the month of February, 1819; that, in that month, he paid on this debt the sum of two hundred eighty two dollars and twenty nine cents, which not being the full amount, was carried to his credit in account current, instead of being endorsed on the note. In April, 1819, he became indebted to the Bank three hundred dollars, with Markley and another as his sureties. In 1824, the then agent of the Bank, seeing the credit on the books in Duckham's favor, and not recollecting that it was paid on the first note, gave the credit mentioned on the execution against Markley. Upon the books and papers of the Bank coming into the hands of

An execution returned to the clerk's office, on which the plaintiff had endorsed a credit for nearly the full amount eight years afterwards, he applies for a new execution for the original sum, regardless of the credit, which he alleges was endorsed by mistake, and which is issued accordingly: held that, though it would be prudent for the clerk, in such case, to wait for an order of court to correct the mistake, yet if he issues the new execution disregarding the credit, and upon a motion to

quash, it appears, that the mistake had really been made, and the defendant was not entitled to the credit, the proceeding may be sanctioned, and the motion to quash, should be overruled.—And the new execution (to correct the mistake) having issued within a year after the mistake was discovered, the right to have it corrected was not lost by lapse of time.

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Bank*

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*Markley.*

another agent, in 1832, he discovered the mistake, and in order to rectify it, took out the second execution, which was replevied by Markley. This being all the proof on either side, the court quashed the replevin bond and execution, as above stated.

We do not understand, that a receipt endorsed upon an execution, by an agent, so necessarily precludes the plaintiff from taking out another execution, as that he will have to cause the receipt to be erased by order of court, before he can legally obtain another. It no doubt will be much the most prudent for clerks to refuse a new execution, under such circumstances, without an order of court. But if a second execution does go, and it turns out that the plaintiff was entitled to it, we do not think the issuing of it should be treated as irregular, and subject the proceedings under it to be quashed.

The time, which bars a proceeding in chancery, or motion at common law, to be relieved against the effect of fraud or mistake, is to be computed only from the time when the fraud, or mistake, was discovered.

The only objection to the right of the Bank to rectify the mistake, that has been urged, is that growing out of the lapse of time. It is not pretended, that there is any statutory bar, but it is insisted, the right should be restricted to five years, in analogy to the limitation of actions on simple contract, or to three years limitation of a writ of error. There is no doubt but the courts ought, as they do, to regulate their practice in analogy to the statutory bar. But then this is done upon equitable principles, such as control and govern courts of chancery in its application. In those courts the bar is never applied in cases of fraud and mistake, except from the time of discovering the fraud or mistake. Applying it in that way here, sufficient time had not run; for the new execution was sued out, according to the proof, within the same year that the mistake was discovered.

It was not shewn on the trial of the motion, that Markley had sustained, or would sustain, any injury by reason of the mistake, and it is therefore unnecessary to say whether that circumstance would have materially effected the right of the Bank to have it rectified.

The judgment must be reversed, with costs, and the case remanded, with directions to overrule the motion.

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1833.

## Craig against Whips.

CHANCERY.

[Messrs. Wickliffe and Wooley for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 15.

LEWIS CRAIG enjoined a judgment which William Whips had obtained against him, on a note made payable to John Dowden, dated in 1807, and assigned to Whips in 1828.

*Solvit ad diem* was a good plea, at common law, to an action on a bond with a condition; and probably in this state, to an action on a single bill—without an acquittance under seal.

The ground for relief relied on in the bill, is the alleged payment of the amount of the note prior to the assignment, and the failure to make any defence in the action at law.

Payment after the day, was not a good plea before the statute.

There can be no doubt that *solvit ad diem* was (at common law) a good plea in bar of a suit on a bond with a condition. But there are authorities tending to shew, that in a suit on a single bill, payment on the day was not pleadable without an acquittance under seal. See *Co. Reports*, 43, a; *Cro. El.* 455—884.

To an action of assumpsit, or debt on simple contract, payment, total or partial, might be pleaded, or given, in evidence under the general issue.

Opposed, however, to these and other concurrent authorities, may be found many intimations by this court, fortified by long established practice in this state, as well as respectable *dicta* elsewhere.

Consequently, chancery has no jurisdiction to relieve against a judgment, in such case, upon the ground of payment.

But the payment insisted on in this case, is virtually alleged to have been made after the day, which was certainly not pleadable at common law, and of which the chancellor has retained, since the statute authorizing it to be pleaded, a concurrent jurisdiction.

A note (made before the act that gives notes the dignity of a simple contract.

There is no positive proof of payment. But the circumstances which have been exhibited, fortified as they

sealed writings,) without further description, must be presumed to be a simple contract. The assignor of a note is not a necessary party to the bill of the promisee, seeking to enjoin the judgment, upon the ground of payment before the assignment, and failure to defend at law.

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are by the lapse of more than twenty years, unaffected by any fact counteracting the legal deduction therefrom, are sufficient to shew satisfactorily, that the whole amount of the note had been paid to the assignor prior to his assignment.

But the note has not been exhibited ; and the only description we have had of it is that given in the bill —“ Your orator—executed his *note*.” From that description alone, we are not permitted to infer that the note was a specialty ; but, on the contrary, should presume, that it was only a simple contract.

In an action of assumpsit, or debt, on such a contract, payment, total or partial, was pleadable at common law, or proveable under the plea of *non assumpsit*, or *nihil debet* ; and, consequently, such matter, when it *might* have been pleaded to the action, or given in evidence under the general issue, was never permitted to avail in chancery, in opposition to a judgment fairly obtained on the contract, unless satisfactory reason for not asserting it at law had been shewn. No such reason has been shewn in this case.

As, therefore, it was Craig's duty to present such facts as would give jurisdiction to the chancellor, and authorize a decree for some relief, we are constrained to conclude, that it was proper to dissolve his injunction and dismiss his bill.

We cannot deem the assignor a necessary party in such a case. The assignment transferred his entire legal right, and his answer could not operate as evidence against his assignee.

Wherefore, the circuit court did not err in dismissing the bill absolutely.

The decree of the circuit court must be affirmed.

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## Bosworth vs. Brand.

[Mr. Crittenden for Appellant: Messrs. Wickliffe and Wooley for Appellee.]

CASE.

1d 377  
all 187  
1d 377  
181 736

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 15.

THIS was an action on the case, in which Brand obtained a verdict and judgment against Bosworth, for the value of a slave killed on Bosworth's farm, at a negro frolic, or dance. The case, when stated most favorably for the verdict, is, that Bosworth permitted some fifty negroes to assemble and dance at an out-house; that a patrolling party surrounded the house about midnight, for the purpose of apprehending the negroes and breaking up the frolic; that the negroes refused to surrender when called upon so to do, and endeavored to make their escape; that one of the patrol, without any necessity for so doing, wantonly fired a pistol, loaded with balls and buck shot, into a dark room, crowded with negroes, and thereby killed the slave of Brand.

By the eighth section of the act concerning slaves, 2 Dig. 1151, it is declared, "that if any master, mistress, or overseer of a family, shall knowingly permit or suffer any slave, not belonging to him, or her, to be and remain upon his, or her, plantation above four hours at one time, without leave of the owner or overseer of such slave, he, she or they so permitting, shall forfeit and pay two dollars for every such offence; and every owner, or overseer, of a plantation, who shall so permit or suffer more than five negroes, or slaves, other than his or her own, to be and remain upon his or her plantation or quarter, at any one time, shall forfeit and pay five shillings, for each negro or slave, above that number: which said several forfeitures shall be to the informer,

A large party of negroes met at a house upon the defendant's farm, to dance and frolic; in the course of the night, a patrol went to the house, to arrest the negroes;—while they were attempting to escape, one of the patrol fired a heavily loaded pistol into a dark room, where many of them remained, and killed a slave belonging to the plaintiff. This action was instituted against the owner of the farm, by the owner of the slave, to recover his value:—held that, tho' permitting the negroes thus to resort to and remain on the def't's plantation, was unlawful, and exposed him to a penalty of \$2 for each one, (2 Dig. 1151,)—it did not render

him liable for the value of the slave so destroyed—the death and damage being the direct and immediate consequence of the shooting, and not the probable or natural consequence of the unlawful act of the defendant.

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*Brand.*

and recoverable, with costs, before any justice of the peace of the county where such offence shall be committed."

That this act renders the conduct of *Bosworth* illegal in permitting the assemblage of the negroes, and that it renders him liable to the penalty therein named, to be recovered in the manner therein prescribed, there is no doubt. But that he is liable for every accident or injury happening to the slaves of others whilst so assembled, or in going to or coming from his farm, is an inference by no means so obviously deducible therefrom. The interests of slave owners and the general peace and good order of a community circumstanced like ours, may have required the legislature to prohibit such assemblages of negroes, even for the purposes of innocent recreation; but it is difficult to strain the fault of him who permits them, beyond that of a mere *malum prohibitum*. The legislative prohibition is accompanied by its own prescribed sanction, and we are not prepared to admit any motives of policy that should induce the general law to apply any additional penalties in aid of that sanction. *Bosworth* must be responsible, or not, for the value of *Brand's* slave, according to the principles of law applicable to all torts. There is nothing in the act quoted, which attaches any such penalty to this particular tort.

Whenever an injury results to a party, from the unlawful act or omission of another, the injured party is, in general, entitled to reparation, and may maintain his action against the wrong-doer; but the injury must be the direct and immediate, or at least, the proximate and natural, consequence of the act or omission complained of. —And tho' an

It is true in the general, that a man is entitled to reparation for every damage he sustains from the unlawful action or omission of another. But the damages must be the direct and immediate, or at least, proximate and natural consequence, of the act or omission complained of. It will not do to carry it to every consequence, however remote, which can be traced to the particular action or omission, and much less to such things as are not a natural consequence, and may have arisen from other and extraneous causes.

Thus, it is said, *Buller's Nisi Prius*, 25, "that if one whip my horse, whereby he runs away with me, and runs over a man, he may have an action against such person, for the whipping was an act of folly, and he ought to be answerable for the consequence. *A fortiori*,

I might maintain an action, if I received any hurt, because the consequence is more natural." He also suggests the propriety of proving, in such cases, that the injury was such as would probably follow from the act done. "So also," he says, "if a man lay logs of wood across a highway, whereby my horse stumbles and flings me, I may bring an action; for whenever a man sustains a particular injury by a nuisance, he may maintain an action; but then the injury must be direct, and not consequential, as by being delayed in a journey of importance." For which he cites *Carthew*, 194, 451.

Pothier, in his treatise on obligations, page 97, says, "if a man sells me a cow, which he knows to be infected with a contagious distemper, and conceals it from me, he is responsible for the damage I suffer, not only in that particular cow, but also for my other cattle to which the distemper is communicated." But, he says, if the loss of his cattle prevented him from raising a crop, which prevented him from paying his debts, and his creditors in consequence seize his property and sell it much below the value, that these consequences being too remote, the fraudulent vendor is responsible for none of them.

Suppose the slave of one goes to the farm of another, and is not driven away in the time prescribed by the above cited act; that in consequence, he is overtaken on his return home, by a hurricane, and killed by the falling of timber, or is accidentally shot, or even whilst remaining after the prescribed time, he is accidentally killed—could the owner of the slave recover his value from the owner of the farm? Or, to take a case under another clause of the statute, that a slave enters a tippling house, and purchases a dram, and whilst in the act of drinking it, he is accidentally or designedly shot, by some one from without the house—would the seller of the dram be responsible for the value of the slave? It seems to us, that all these propositions must be answered in the negative, and that the contrary opinion has no plausible foundation in either law or justice:

If in the cases put, or in this case, the slave had been detained against his will, and whilst so detained, had been killed, there would have been more plausibility in

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injury may be traced up to the unlawful act of one man, if it would not have happened but for the subsequent, unlawful act of another, the latter alone is liable.

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*Brand.*

asserting such liability. And here, in the not attending to the important distinction between the assumption, and non assumption, of illegal control over the slave, lies the fallacy of the argument of the learned counsel in favor of the verdict, and exists the want of analogy between this case and all or most of those to which he attempted to liken it.

If one man takes the horse of another without authority, he is a tort feasor all the time he detains him, and if the horse be killed whilst in his possession, by however improbable or unexpected a casualty, he is responsible. Not so, however, if the horse had strayed upon his farm, and was there permitted to remain merely.

The true view of the case is, that the permitting the negroes to assemble and remain at the frolic, was not, properly speaking, the cause of the death. The cause was the wanton malice of the patrol; and if that had been produced by drink given by another, that other would have been a much more proximate cause of the death, than either Bosworth or the frolic; yet we presume no one would contend for the liability of the giver of the drink. If one invites another to dinner, and the guest, whilst on the way or at the dinner, is wantonly killed, it cannot be properly said of the giver of the feast, that he caused his death.

It is illegal to cut a ditch across a public highway, and he who does it, is liable for any special damage another thereby sustains; for instance, if a slave should be killed or maimed by falling into the ditch. But if a slave, whilst merely detained there, is accidentally killed by the going off of a gun or by the wilful malice of another, his death could not properly be ascribed to the digger of the ditch. Yet it would follow that he, and all others similarly circumstanced, would be responsible for the slave, if we were to visit such liability upon Bosworth.

By a post revolutionary English decision, the setter of a trap in which a dog was killed, was held responsible for the dog, because it was set so near to the ground of the dog's owner, that the bait could be smelt therefrom,



and the dog did but obey his instinct in following the lure that was set for him. Now, the permitter of a negro frolic is distinguishable from the setter of the trap in two important particulars. A negro is not a mere brute, with an instinct in lieu of reasoning properties, and destitute of rational qualities, to restrain the impulse of his appetite, nor does the frolic necessarily carry with it such perilous consequence to him, when visited, as did the trap to the dog. But without the aid of these distinctions, suppose the dog had been accidentally or wilfully killed by some third person, before he reached the trap, would the setter of the trap have then been responsible. Or, to make the cases more completely analogous, suppose (in lieu of the trap,) the bait had been merely fastened to a tree, and that, whilst in the act of eating the bait, he had been shot by a third person. How would the case then have gone? It is impossible to presume the setter of the bait could have been held liable. If not, then that case is conclusive of this; for it it will be vain to attempt to distinguish them. The same law determines both. It was as illegal to lure the dog, as the negro, from the premises of his owner to those of another.

We will not prolong the discussion, for where a case falls so obviously and widely apart from the rule of principle within which it is attempted to be brought, as this does, it serves little the purposes of illustration to suppose others only equally so. The mind that infers liability in the one, will do it in the others also.

In our opinion, the verdict was without sufficient evidence to sustain it; and the jury should have been instructed to find for the defendant, as was requested on the trial.

The judgment is reversed, with costs, and the cause remanded, with directions for a new trial, consistent herewith.

Fall Term  
1833.

*Bosworth*  
vs.  
*Brand.*

Fall Term  
1833.



CHANCERY.

**Winlock against Winlock.**

[Messrs. Morehead and Brown for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR GREEN COUNTY.

October 15. Judge NICHOLAS delivered the Opinion of the Court.

A guardian applying to the circuit court for an order to sell the real estate of infants, is required (by an act of 1813,) to give bond for the faithful performance of the trust, before the decree is rendered, and also, to report his proceedings, under the decree, to the court.

The proceeds of the sales, in such cases, are to be disposed of, for the benefit of the infants, according to the order of the court decreeing the sale, and not otherwise.

Application may be made to the court for such order, which it is the duty of the court to make; or, the court, having power over the whole subject, will sustain the bill of the infant for relief, & may make an order upon

JOSEPH WINLOCK, as the guardian of William Winlock, obtained a decree from the Green circuit court, for the sale of his interest in a tract of land, and gave a bond, with George Winlock, conditioned as the act authorizing the sale of the real estate of infants, requires. At the sale, George Winlock became the purchaser of the infant Winlock's interest in the land, and paid the purchase money to Joseph Winlock, who never having accounted therefor with the infant or the court, and dying intestate and insolvent, and no administration having been taken on his estate, William Winlock filed this bill against his heirs and George Winlock, as his surety, praying the court to compel them to account for the proceeds of sale, and that the same might be paid over to him.

To this bill George Winlock demurred, and the court sustained his demurrer, and dismissed the bill.

We think the court had jurisdiction of the case, and that the complainant was entitled to the relief prayed.

The act of 1813, 2 Dig. 667, requires the guardian making the sale to make report of his proceedings, and says the court shall have power to order and decree the proceeds of sale to be disposed of in such manner as may seem most for the interest and welfare of the infant, and at any time to require from the guardian a settlement of his accounts. The act also requires that the bond with surety to be given by the legal guardian before the sale is decreed, shall be conditioned for the guardian's faithfully discharging all the duties imposed upon him by the

act, or by any order or decree of the court in pursuance thereof.

We think it is sufficiently manifest from these provisions, that it was the intention of the legislature, that the proceeds of these sales were not to go into the hands of the ordinary guardian, to be used and disposed of by him, as the ordinary funds of the infant, but were to be kept separate and apart, and subject to appropriation exclusively under the order of the circuit court, granting the order of sale. As no such order ever was made in this case, the obtention of it would alone afford abundant reason for the complainant's resort to the chancellor for the relief which he seeks. And as no rightful disposition could be made of the proceeds of sale without such order, it is equally clear, that George Winlock is liable for a compliance with such order, when made. He no doubt exempted himself from liability as purchaser, by paying the purchase money to the guardian; but that could not save or in any way effect his responsibility as the guardian's surety, in the bond given before obtaining the order of sale, and there can be no mode of subjecting him to that responsibility, more appropriate than by a decree in this suit.

If, therefore, on the return of the cause, no satisfactory reason be shewn to the contrary, the court should make an order upon the heirs of Joseph Winlock to pay, by a convenient day, to the complainant, the amount paid by George to Joseph Winlock, with interest, and on their failure to comply, a joint decree therefor should be rendered against them and George Winlock.

The decree must be reversed, with costs, and cause remanded, with directions to overrule the demurrer to the bill, and for further proceedings consistent herewith.

Fall Term  
1873.

*Winlock*  
vs.  
*Winlock.*

the guardian, or his representatives, to pay the proceeds & interest, by a given day; and, upon their failure to comply, may render a joint decree, against him, or them, and his surety in the bond for the amount.

Fall Term  
1833.

MOTION.

*Clifford et al. vs. Cabiness.*

[Messrs. Morehead and Brown for Plaintiffs: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR MUHLENBURG COUNTY.

October 16. Chief Justice ROBERTSON delivered the Opinion of the Court.

One justice of the peace has no authority to issue an execution upon the judgment of another, who remains in office and retains his records. — Nor is a constable bound to execute or return such a process.

A constable failing to return an execution for 20 days after the return day, is liable for the amount then due, and ten *per ct.* damages — not for interest.

ON motion, Cabiness recovered a judgment against Clifford, as constable, and against Dennis and Hay, his sureties, for a failure to return, within twenty days after the return day, a *feri facias* which had been issued in favor of Cabiness against Bell, by *Isaac Bard*, a justice of the peace, upon a judgment rendered by *John Campbell*, another magistrate; and which execution was made returnable to the office of Bard.

It appears that, after the execution had been delivered to the constable, and before the return day, the county court made an order, reciting that *Bard* had ceased to be a justice of the peace, and directing the clerk to deliver his official books and papers to *Campbell*; and it appears also, that the execution in favor of Cabiness against Bell, was not returned to *Campbell's* office until about six months after the return day.

On this state of case, the circuit court pronounced judgment against the constable and his sureties, for the amount of the execution and legal interest, and ten per cent. damages. And this writ of error is brought to reverse that judgment.

As the judgment against Bell was rendered by *Campbell*, (who seems to have continued in office, and to have retained his records until after the execution was issued,) *Bard* had no authority to issue the execution upon it; and consequently, the constable was not bound to execute, or return, it to Bard or to Campbell. And moreover, had the constable been liable for not returning the

execution, he was liable, on motion, for only the amount due at the time of his default, and ten per cent. damages on that amount. He was not responsible for interest also. *Trover vs. Sharp*, 4 J. J. Mar. 79.

Wherefore, the judgment is reversed, and the cause remanded.

Fall Term  
1833.

Jones  
vs.  
Cromwell.

## Jones vs. Cromwell.

CHANCERY.

[Mr. John Trimble for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR NICHOLAS COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 16.

CROMWELL—as assignee of Orear, who was assignee of King—sued Jones for a breach of covenant in failing to convey a tract of land, which he had sold and covenanted to convey, on the payment of the whole consideration.

The defendant, in an action upon an assigned writing, cannot require proof of the assignment, without an oath that he believes it is forged; and his plea, having that effect, may be rejected, for want of the oath.

The declaration averred that, "on the 27th day of February, 1832, the defendant was fully paid;" it also averred, that the covenant had been assigned to Orear, on the 22d of July, 1830, and by Orear to Cromwell, on the 31st of July, 1832, of which Jones "had due notice," but that he had failed and refused to make a deed to Orear.

If the want of a sufficient assignment is relied on, the defendant should crave oyer of the writing and assignment; and if none be shown, the pl'tf fails; if an insufficient one, it is ground of demurrer.

Jones offered a plea, denying that Orear had assigned the covenant to Cromwell. But the court refused to allow it to be filed, because (as we presume) there was no affidavit of its truth.

He then pleaded that, "neither the said Richard P. King, nor the said Jeremiah Orear, nor the plaintiff," had fully paid him for the land, and tendered an issue to the country. A demurrer to that plea having been sustained, damages were adjudged against Jones, on a writ of enquiry.

Payment of the consideration was a condition precedent to the performance of

the defendant's covenant; the declaration averred, that "he had been fully paid;" the plea, that, "neither K., O. or C. had paid;" they being covenantee, and the only assignees, held that the plea contained a sufficient negative of the averment, and was good.

A declaration which avers sundry assignments of the covenant sued on, of which defendant "had due notice," and charges a non performance to the assignee who held it when the condition precedent was performed, and the breach occurred, is sufficient, without averring non performance to the covenantee or plaintiff.

Fall Term  
1933.

Jones  
vs.  
Cromwell.

This writ of error is brought to reverse that judgment.

The circuit court did not err in rejecting the first plea. The seventh section of an act of 1812, 1 Dig. 99, provides, that, in a suit by an assignee of a bond, the defendant shall not require proof of the assignment, unless he shall annex to his plea, denying the assignment, an affidavit that he believes that it was "*forged*." But the plea in this case being only that there had been *no* assignment, it is argued, that the above recited enactment does not apply to it. It is true that, if there had been *no* assignment, the plaintiff in error could not have sworn that "the assignment" (which did not exist) had been forged. Nevertheless, his plea was inappropriate. He ought to have required oyer of the assignment. If there was *no* assignment, oyer could not have been given, and then the plaintiff in the action would have failed. But if oyer had been given of an assignment, then, if it had been such as did not vest the legal cause of action in the assignee, a demurrer would have been proper. But if it had been such an assignment as *prima facie* authorized the suit, but was not genuine, then, to a plea denying its genuineness, an affidavit, that the plaintiff in error believed that it had been forged would have been necessary and proper.

But the second plea is substantially good. The objection which has been urged against it, is, that the declaration averred only that "the defendant *had been fully paid*;" and that therefore a denial, merely that either *King*, or *Orear*, or *Cromwell*, had paid the consideration, was not responsive to the averment.

It seems to us, that the negation was commensurate with the allegation. If the latter be sufficient, it can be so only because it imports that the money had been paid by the covenantee, or his assignee, or at the instance, and for the use, of the one or the other. The plea should be interpreted as importing precisely the converse; for, had the money been paid for *King* or his assignee, it was paid by the person for whose use it had been paid.

As the sufficiency of the declaration has been called in question, and may again be disputed, we will notice that also. The only objection which has been suggested, is, that there is no averment that no conveyance was made to King or to Cromwell. But the declaration shews that, on the 27th of February, 1832, when the breach is charged to have occurred, Orear held the note, as assignee, and that Jones had notice of that fact. Consequently, an averment that he did not make a deed to "Orear" was sufficient.

For the error in sustaining the demurrer to the second plea, the judgment of the circuit court is reversed, and the cause remanded.

Fall Term  
1833.

*Swearingen*  
*et al.*  
vs.  
*Fields et al.*

## Swearingen *et al.* vs. Fields *et al.*

EJECTMENT.

[Mr. Chinn for Plaintiffs : Mr. Hanson for Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 18.

THIS is an action of ejectment, in which the appellees, who were defendants in the circuit court, obtained two verdicts ; and this appeal is prosecuted to reverse the judgment on the last verdict.

The appellees insist, *first*, that the circuit court erred, to their prejudice, in setting aside their first verdict, and that, therefore, were it admitted that their judgment on the last verdict was erroneous, there should be no reversal, because the only consequence would be the same judgment on the first verdict. *Second*, that there is no error in the judgment on the last verdict.

The first verdict was set aside on the ground that it was not authorized by the evidence. We are inclined to the opinion, that the judgment granting the new trial, should not have been disturbed, had the appellants succeeded afterwards. But we are also strongly inclined to

Two trials and verdicts for defendants in the court below. Motion for another trial overruled : and that decision, the evidence being deemed sufficient to warrant the finding, approved by this court.

Fall Term  
1833.

*Swearingen*  
*et al.*

vs.  
*Fields et al.*

the opinion, that a second verdict upon *the same evidence* should not have been set aside; and therefore we are clearly satisfied, that, as the facts proved by the appellees; on the last trial, were much more favorable to their defence, than those were which they established on the first trial, the circuit court did not err in overruling the motion for a third trial, unless there was some material error to the prejudice of the appellants in the progress of the last trial. They insist that the circuit court erred in admitting incompetent testimony, and in misinstructing the jury. Whether there was any such error committed by the court is the only remaining and more important subject of enquiry.

The fact, that an agent had exceeded his authority in selling and conveying land, and thereby incurred a liability, does not render him incompetent, as a witness, in a suit for the land, by persons, who do not derive their title from his principal, as his liability would be the same whatever the event of the suit. If the motive for enforcing the liability would be lessened by a verdict for the party calling him, it might affect his credibility. In a suit (for the land) between his constituent, and those claiming under his deed; he would be incompetent.

I. The only objection which has been made to the competency of the testimony, was to that of one Van Morgan, who had, as the agent, and in the name of his mother, Drucilla Thornburgh, sold and conveyed the land, or a part of the land, in contest, and which the appellees claim to have derived from that conveyance. The objection to his competency (as specified) is, that he had no authority to make the sale, and that, therefore, he was interested in the event of this suit. We can perceive no such interest. It may be true, that, by a proper construction of his power, his authority was inapplicable to this particular tract of land, and that, therefore, he might be responsible for transcending his delegated power. But that responsibility does not depend on the event of this suit, nor can it be directly or necessarily affected by this judgment. He may be made equally accountable whatever may be the event of this suit. It is true, that the success of the appellees may possibly diminish the motive for enforcing that liability, but it cannot effect its continued existence, or impair or diminish it. And, therefore, if his want of authority to sell the land could have had any effect on his testimony, it could have effected only his credibility. The defence of the appellees could not have been affected by the validity or invalidity of his authority to make the conveyance, nor was it material to him whether his constituent, or the appellants, had the better right to the land. In a suit between her, and his alienee, Van Morgan would



have been interested ; but he has no *legal* interest in this suit.

II. The only instruction which we deem it necessary to notice, is that numbered 6, and on which the merits of the case depended. It is in these words :—" That if the jury believe from the evidence, that Andrew Swearingen, for and in behalf of his sister, Drucilla Thornburgh, and as her agent, took possession of the land as her property, twenty years before the commencement of this suit, and placed tenants on said land, with her approbation and for her benefit, and to hold possession for her, and that the possession of the said land has continued, adversely to the title of Thomas Swearingen the second, in the tenants of said Drucilla Thornburgh and those claiming under her, uninterruptedly, ever since the first beginning of said possession, and that such possession has been transferred to the defendants, the law is for them, and the jury ought to find for the defendants."

The instruction was not abstract, because there was *some* evidence tending, in *some* degree, to establish every fact hypothetically assumed. And, as the appellees, according to the facts stated, stood in the same attitude as that in which Drucilla Thornburgh should be deemed to have been, had she, instead of others claiming under her, occupied the land for more than twenty years immediately preceding the institution of this suit, and as it is evident, also, that, as the only legal title asserted by the appellants was derived from "Thomas Swearingen, the second," any adversary possession which would have barred him, must equally bar *them*, who did not acquire his title until after the statute of limitations (if it ever ran at all) had commenced running ; therefore, the instruction seems to be nothing more or less than the deduction of law from the hypothetical facts.

We have already suggested, that the instruction was not, in any respect, abstract. But as the hinge on which the whole case turns, is the legal deduction from the facts which the proof tended to establish as to the *character* of the possession, we will briefly consider that matter.

Fall Term  
1833.

*Swearingen*  
*et al.*

vs.  
*Fields et al.*

Instructions—  
that if the jury found defendant's possession was adverse, and had been so held by them and those under whom they claimed, uninterruptedly, for 20 years, the law was for them—approved, as the deduction of law, from facts that the proof conducted to establish.

Fall Term  
1833.

*Swearingen  
et al.*

vs.

*Fields et al.*

A devise being entitled, by will, to a specific quantity of land, to be allotted to her; the allotment having been made, and possession taken, to hold in severalty: held, that — whether the land so allotted was such as passed by the will, or, being acquired after its publication, descended to the heir — the possession so taken and held by the devisee, was *adverse* to the heir, co-devisees and all others, and protected by the statute.

The question is whether, admitting every thing which the facts conduced to prove, the possession should be deemed to have been *adverse* to the "title" of "Thomas Swearingen, the second."

The land in controversy was granted to Thomas Swearingen (the elder, or *first*.) in 1785. He had other Kentucky lands. By his will, proved in 1787, in Virginia, where he lived and died, he devised four hundred acres of his Kentucky lands to his daughter, Drucilla Thornburgh, "*to be allotted to her*;" and then devised the residue of the same lands to all his children, five in number, and of whom Thomas, "*the second*," and Andrew were two. The latter devise is in these words:—"It is also my will, that all the land that a title shall be obtained for, by virtue of my warrants and claims on the western waters, that is not otherwise disposed of, be divided among my said five children." The will was published on the 15th of October, 1780, and the land warrant, (which was a Treasury warrant,) on which the title to the land now in contest is founded, was not issued until the 13th of December, 1781.

The will did not pass any land to which the testator had no claim at the date of its publication, unless the words—"title *shall be* obtained for by virtue of my warrants"—should be construed as importing an intention to devise all the land which might be appropriated under warrants which he then had, or should afterwards obtain. And if the tract in controversy did not pass by the will, it descended to Thomas, "*the second*," by the law of primogeniture, in full force at the time of the testator's death. There is reason to believe that all his children,—Thomas as well as the others,—believed, until within a few years past, that all the land to which the testator had acquired any title before his death, passed by his will. And the testimony tended to prove, that the tract which was appropriated under the warrant which was issued after the publication of the will, was allotted to Drucilla Thornburgh, for her four hundred acres specifically devised.

It is not material in this case, whether this tract passed to the five children by the will, or descended to

Thomas. A decision of that point would not affect the right of the appellants to recover, except as to quantity. Their claim is derived from the will of Thomas, "the second," and a deed (dated 1823) from Andrew Swearingen, who had, in 1806, or 9, bought from Thomas all his interest in "the Kentucky lands," and had, in the latter year, reconveyed the same interest to Thomas, by deed of mortgage.

Fall Term  
1823.

*Taylor*  
vs.  
*Knox's ex'rs.*

It seems clear to us, that if, as the jury must have found, Drucilla Thornburgh, *in fact*, held and claimed the land as a devisee and in *severalty*, she held it adversely to the independent title of Thomas, as heir, (even though there may have been a mistake as to her right, or as to Thomas's) and adversely to the claim of her co-devisees. And therefore, whether Thomas owned the whole tract, as heir, or only a portion, as a co-devisee, the instruction of the court was applicable to the facts, and was the deduction of law from that which they tended to prove; and which, whatever may be the preponderance of probabilities, the jury had a right to find.

Wherefore, the judgment must be affirmed.

### Taylor against Knox's Executors.

CHANCERY.

[Mr. Haggin, Messrs. Wickliffe and Wooley and Mr. Richardson for Plaintiff: Mr. Monroe, and Messrs. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 16.

COLONEL KNOX, as patentee, owned two tracts of land in the state of Ohio—one of two thousand, the other of seven hundred acres. He was entitled to one thousand six hundred twenty eight acres and two thirds, in land warrants, as a balance due him for his services in the revolutionary army. He employed Taylor, the plaintiff in error, to take care of the two tracts, to pay taxes on them, and on other lands which he owned in Ohio.

Statement of the  
controversy.

Fall Term

1833

Taylor

vs.

Knox's ex'rs.

And likewise, to obtain land warrants for the balance due him, as an officer of the Virginia continental line. He at length gave Taylor authority to sell his lands in Ohio. Under the powers thus conferred, Taylor obtained two land warrants, one for eight hundred eighty eight acres and two thirds, the other for seven hundred and forty acres, and sold the whole or greater part of said two tracts of land.

In 1821, Knox filed his bill against Taylor, praying for an account of all his transactions as agent, and claiming the moiety of the two warrants, or the half of the proceeds of the sale of the land which had been secured in virtue of said warrants.

Taylor, in his answer, claimed the whole of the warrants, or land secured by them; and exhibited his accounts of the sales of the two tracts aforesaid, from which it appears, that he owes a balance to the representatives of Knox.

Points to be decided.

There are but two questions of consequence presented by the record.

*First.* Is Taylor entitled to the whole of the two land warrants?

*Second.* Is Taylor chargeable with interest on the funds of Knox in his hands? and if he is, from what time should interest run?

The circuit court settled both these questions most unfavorably to Taylor, and he prosecutes a writ of error.

Allegations, denials and conflicting statements of the parties.

The parties differ very widely in their statements, and much is left to be determined by inference from facts, there being very little direct evidence bearing upon the controversy.

As to the first point—Knox alleges, that he assigned the land warrants to Taylor, to hold a moiety for his own use, and the other moiety in trust for the use of the assignor. Taylor denies this, and says he was entitled to a moiety of the warrants for his services in procuring them, and that he purchased the other moiety at thirty three and one third cents per acre, and paid for them in money advanced to discharge taxes.

Knox moreover contends, that the transfer and assignment of the whole of the warrants ought not to

stand, because Taylor perpetrated a fraud, in concealing, at the date of the transfer, the facts, that the warrant for eight hundred eighty eight acres and two thirds, had been surveyed before that time, and that Taylor had previously sold a portion of the land at two dollars per acre. Taylor obviates this, by stating that the contract had been verbally made some time before it was reduced to writing, and that Knox was apprized of the survey on the warrant for eight hundred eighty eight and two thirds acres, before the assignment was executed, although nothing was said about it at the time the assignment took place.

Fall Term  
1833.

*Taylor*  
*vs.*  
*Knox's ex'rs.*

The following facts are indisputable, and upon them the right of Knox to an interest in the warrants must depend, if he has any.

Certain facts,  
not controverted.

On the 28th of March, 1807, Knox assigned to Taylor half the warrant for eight hundred eighty eight acres and two thirds. On the 6th of January, 1813, he assigned the other half. On the 13th of January, 1818, he assigned the whole of the warrant for seven hundred and forty acres.

The entry on the warrant for eight hundred eighty eight and two thirds acres was made on the 16th of May, 1808. A survey was executed thereon, on the 11th of June, 1808; but this survey was not examined and recorded in the principal surveyor's office, until the 3d of July, 1820.

The assignment of each warrant purports to be for value received, and is without any condition upon the face. The assignment of the half of the warrant for eight hundred eighty eight and two thirds acres, dated 28th of March, 1807, is for an equal moiety of the warrant "with an equal interest in any survey that shall or may be made on the said warrant, and requests that a patent, or patents, may issue in the joint names of myself and said Taylor." The assignment of the other half is in these words: "I do assign over to James Taylor, within mentioned, the other half of the within mentioned warrant, and request that a patent may issue to him, his heirs or assigns, for the whole amount of the said warrant, for value received." To which there are two subscribing

Land warrants  
being transferred  
without reservation  
in the assignment,  
and no proof that a  
trust was intended  
— none can be presumed.

Fall Term  
1833.

*Taylor*  
vs.  
*Knox's ex'rs.*

witnesses. The deposition of neither has been taken. It cannot be inferred from the aforesaid assignments, whether Knox had or had not a knowledge of the execution of the survey, in virtue of the warrant, at the time he made the last assignment ; but it is obvious, that the language used was designed to secure titles to Taylor upon the surveys which might be or had been made. The contracts, as evidenced by the writings, shew that there was no trust for Knox's benefit, reserved in any part of the warrants. There is no evidence *aliunde* to shew an intention to create such a trust. Consequently, there is no ground on which to regard Taylor as trustee for Knox, in respect to either of the warrants, or any part of them.

Allegation of an answer, that the transfer of land warrants was by verbal agreement, anterior to the assignment endorsed, must be supported by proof, or the date of the assignment must be taken as the true date of the transfer.

It remains to enquire into the alleged fraud ; and upon this ground it seems the circuit court based its decree.

If, as Taylor states, he made a verbal contract for Knox's half of the warrant of eight hundred and eighty eight acres and two thirds, in the latter part of 1807, or early in the year 1808, which was afterwards consummated by the assignment dated 6th of January 1813, there is no foundation for the imputed fraud. But of the existence of any such verbal contract there is no proof, other than the statement of Taylor. It is true, at that time Knox was indebted to Taylor, for advances in paying taxes, and it is probable that he might have discharged the debt by selling the warrant, as Taylor avers that he did. This however, is mere conjecture, and will not authorize us to conclude, that the assignment of half the warrant, in 1813, was the consummation of a previous verbal contract. In determining, therefore, whether a fraud was practised by Taylor, the circumstances existing on the 6th of January, 1813, must be considered, and the parties must be looked upon as contracting on that day. Taylor admits that his agent, Eubank, in 1810 and 1812, sold one or two small tracts out of the survey of eight hundred and eighty eight acres and two thirds, for about two dollars per acre, in property upon long credits ; but he does not admit or deny, that he was informed of those sales before the assignment of

Knox's half of the warrant in 1813. He is silent as to the time when he was first informed of these sales. He says they were made in his absence from the state. The charge in the bill is, "that Taylor and Lytle claiming under him had, prior to the year 1813, sold out parts of said land." Taylor admits the charge—he acting by agent; and does not deny, but that he had knowledge of his agent's sales before he procured the assignment of the 6th of January 1813. The inference is, judging from the usual course of business, and presuming that Eubank, as a faithful agent, notified his principal, within a reasonable time, of the sales made, that Taylor was apprized at the time of the assignment, of the sales made by Eubank at two dollars per acre, payable in property, other than money, on long credits. It is clear, that Knox parted with his right to the warrant only. It had been placed in Taylor's hands and subject to his control since the assignment of half in 1807. Had Knox known that the warrant had been located and surveyed upon land worth two dollars per acre, in property on a long credit, he might not have been willing to take thirty three and one third cents per acre. Although Taylor denies that he had any knowledge of the execution of the survey upon the warrant; yet from the fact of his selling the land by his agent Eubank, the deduction is fair that he knew Knox's warrant had secured title to the particular land sold; and if by entry in the office of the principal surveyor not yet surveyed, it was the same thing so far as the interests of Knox were concerned, as if the survey had been made, and he knew it. The question is, was he bound to communicate to Knox his knowledge that a part of the land had been sold at two dollars per acre, in trade, upon long credits? We think, fair dealing required that he should have done it, and as he did not, that in equity he ought to account to Knox's executors for half the cash value of the land, with interest thereon from the times the several portions thereof were sold to purchasers, deducting therefrom half the expenses for locating, paying tax-

form the party who furnished the warrants; and if, without giving that information, he buys the other half of the warrants for less than the value of the land, he shall, nevertheless, account for its full value at the time he sold it.

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That a party is informed of a sale of land made by his agent is a just inference; and it is to be presumed, that he knew, also, how the land was acquired.

It is the duty of an agent to inform his principal of his proceedings.—One receives land warrants, a moiety of which is assigned to him, to locate them on shares, and sell the land: having done so, he should in-

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*Query, whether a stranger would be bound to impart his knowledge before making the purchase.*

If the vendee of land loses it, he may recover of his vendor, the nominal amount of the consideration, altho' it was paid in property at an exorbitant price—a rule which might work injustice; but it has been so decided—and men may make their contracts accordingly.

This rule does not apply to an agent who by taking property in payment, on his own account, sells the land of his principal at a high price: he shall account only for the fair cash value of the land, with interest from the time of the sale.

es &c. which were incurred by Taylor in securing the land. If Taylor had been an entire stranger to the whole transaction, and if he had not been the agent for Knox, and then had taken an assignment of Knox's half of the warrant, we will not say that he could not hold the land, although Knox might have made the assignment being ignorant that any land had been secured by entry and survey. Nor is it necessary now to decide that a stranger to all the transactions, having had no connection with them, but knowing that the warrant had been entered and surveyed, and applying to Knox to purchase, would have been bound in equity to communicate all his knowledge to Knox; or be compelled to give up the contract he might enter into, upon the ground that he was better informed than Knox, in regard to the facts. The relation subsisting between Taylor and Knox placed Taylor upon a different footing from that which a mere stranger would occupy.

We think the circuit court erred as to the measure of Taylor's liability for the half of the warrant for eight hundred eighty eight and two thirds acres. That court took two dollars per acre as the criterion, because Taylor sold the land for that in trade. We know it has been decided by this court, that if a vendee loses land which he has paid for, *in trade*, he shall recover of the warranting vendor, not the cash value of the property paid, but the estimated price of the property. This rule, if invariably applied, may work great injustice. A is willing to give B a horse for a hundred acres of land. B is willing to take the horse for the land, and lets A price the horse at a hundred, or a thousand dollars, provided the land is estimated as high. Such a bargain is in truth an exchange of one thing for another, and in which the estimated price is a matter of no importance. In case the title fails, A should only recover the true value of his horse, or of the land lost; and there would be no propriety in estopping the parties by the agreed price, if it had not been so decided. Now parties may fix prices with a view to the decision. If that is done, the rule is fair; but where that is not done, the rule may operate very unjustly. This rule, however, does not apply be-



tween Taylor and Knox. Taylor's vendees might possibly avail themselves of it, were they to lose the land. But what has Knox lost? Half the true value of the land, only. His injury will be fully compensated by giving him that value, at the times when Taylor converted it to his use, and interest on it. If Taylor sold the land for less than its value, Knox ought not to lose by such a sale. So if Taylor sold it for more than its value, by converting it into other property, which proved to be a fortunate speculation, Knox would have no right to share in the profits. If he could satisfy Taylor's sales, and claim an interest in his speculations, he should be confined to a division of the identical property, or its value, which Taylor received for the land, and not be permitted to abandon the property, and claim the price which Taylor and his vendees put on it. Whatever may be the doctrine by which Taylor, in a controversy with his vendees, might be estopped to deny that the price put on the property received by him for the land, was the true cash or credit value of the property, we perceive no reason for applying that doctrine in this case between Taylor and Knox. It is, therefore, our opinion, that Knox's executors should recover the cash value of half the land sold by Taylor, or his agents, and which was obtained in virtue of the warrant for eight hundred eighty eight acres and two thirds, with interest thereon from the times the land was sold, subject to a deduction of all reasonable charges for locating, surveying, paying taxes &c.

As it respects the warrant for seven hundred and forty acres, assigned in 1818, we have been unable to find in the record, any fact or circumstance from which it can be inferred, that Taylor took advantage of the ignorance of Knox, and concealed important facts which he ought to have made known, for the purpose of procuring the assignment. The contract for that warrant must be regarded as made in 1818, and is unimpeached by any thing exhibited. Consequently, it should be permitted to stand, and Taylor should be compelled to account for one half of the value of the warrant, with interest there-

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Land warrants being delivered to a locator, with an assignment to him of half the right— inference that he was to have that half for his services, in locating &c.

on from the date of the assignment. The decree of the court is altogether erroneous in respect to this warrant.

We think it sufficiently appears, from all the circumstances, that Taylor was to have half the two warrants for his services in procuring them. This seems to follow from the fact that Knox, in 1807, assigned Taylor half the warrant for eight hundred eighty eight acres and two thirds, while he retained the residue; thereby shewing that Taylor's title to the half was then complete. As it does not appear, except from Knox's statement, denied by Taylor, that the latter was bound to incur the expense of locating, surveying and carrying into grant the amount of both warrants, in consideration of the half assigned to him, we have deemed it right to charge Knox for these things so far as the half of the warrant for eight hundred eighty eight and two thirds acres is concerned. But no such expense must be charged against Knox for the warrant of seven hundred and forty acres, the assignment of that being permitted to stand. It is obvious that Knox, when he assigned his interest in these warrants, was desirous to dispose of his lands in Ohio by sale. It is therefore highly probable, that he would be anxious to sell his warrants, without incurring the expense of locating, surveying &c. We look upon the transfers as absolute sales, and so intended to be, and have only thought proper to interfere to set aside the assignment of 1813, because Taylor did not make known the facts, which we are bound to presume were within his knowledge, and which, if communicated, would, or might have had an important influence over the conduct of Knox in making the contract.

A mere depository, or one who receives the money of another, but does not use it, is not to pay interest. —Whoever uses the money received for another, is liable for interest.

Upon the point relative to interest, it is our opinion, that Taylor should be compelled to pay it, but, that it ought not to be compounded upon him. As a mere depository, Taylor would not be answerable for interest. As an agent, selling land and receiving money for his principal, he would not be answerable for interest, provided he had made no use of his principal's money. But here Taylor acknowledges, that although he made no *particular* loan or purchase with the money of Knox, "he may have sometimes used the money as his own,

holding himself responsible to account for the same at any time, upon reasonable notice." He has not so accounted. Having used the money, and failed to pay, he ought to pay interest. The true principle upon which interest is chargeable, is laid down in the case of *Cartmill vs. Brown*, 1 *Marsh.* 577, and it applies to the facts of this case. Taylor was indebted to Knox the several sums collected by him, and in case he used the money as his own, instead of holding it in deposit, it was a conversion of that which did not belong to him. Shall he pay nothing for the tort, in thus using what he had no right to use? Suppose a lawyer collects and uses his client's money, and withholds payment, shall he thereafter be permitted to satisfy the debt without interest? In such cases, we see no impropriety in treating the transaction precisely as it would be regarded if the agent, or lawyer, had executed his note to his principal, or client, for the amount of money received. The note would bear interest. The implied contract, in reason, should have the same effect. Knox insists that Taylor retained the money upon an express contract to pay interest. This is denied by Taylor, who avers that he held the money with the assent of Knox, with the understanding that he was not to pay interest. The statements of the parties cannot be reconciled. There is no proof upon which we can decide between them, and we have reached the conclusion that Taylor is accountable for interest, regardless of any special contract upon the subject.

Taylor made advances for Knox in paying taxes. He should be allowed interest on his advances from the times they were made up to the time when the funds of Knox, received by him, were sufficient to extinguish the advances so made and the interest thereon.

Taylor's reasonable charges and commissions should be deducted from the amount of money collected for the sales of Knox's lands, and the balance left should carry interest. This was not attended to in the adjustment of the accounts which was made the basis of the decree. We see no proof in the record which shews how much Taylor ought to be allowed for his services,

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An agent is entitled to interest on advances made, in transacting the business of the principal.

The advances, commissions & charges of an agent making sales, should be deducted from the proceeds—decree for the balance.

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in paying taxes, selling lands, and collecting and receiving the money. On the return of the cause, these things may be enquired into. Nor does it appear from vouchers filed, how much he paid for taxes. We suppose the account is correct, but it should appear so in proof, by an exhibition of the vouchers, which are no doubt in the possession of Taylor.

In trover, the jury may give damages equal to the value of the thing converted and the interest on it. Upon the same principle, the chancellor, in decreeing against an agent who had received "trade" on his own account, for the land of his principal, may include interest in the decree, in addition to the cash value of the land at the time of the sale.

It may be asked, why we allow interest on the value of Knox's half of the eight hundred eighty eight acres and two thirds of land and seven hundred and forty acres warrant, seeing that the value has never been liquidated between the parties by any ascertained contract? The principle on which it is allowed may be found in *Sanders vs. Vance*, 7 Mon. 213. There it is said that the jury may, in trover, give damages "equal to the value of the thing converted and interest." Now, as the assignment of the half of the eight hundred eighty eight acres and two thirds, executed in 1813, has been disregarded upon the principle of *suppressio veri*, and Taylor had no right under that contract to appropriate the land to his use, but did it, we see no reason why the measure of his responsibility should not be the same as if it had been a chattel which he had converted. - According to the evidence, thirty three cents and a third was a fair price, per acre, for the half of the warrant for seven hundred and forty acres. Taylor says the price was liquidated at that. We shall so take it, and direct interest to be allowed on one hundred twenty three dollars thirty three cents and a third, from the 13th of January, 1818, when the warrant was assigned, up to the time of rendering the decree, as the measure of recovery for Knox's half of the seven hundred and forty acres warrant.

This cause is to be referred to a commissioner to state the accounts, & take proof.

On the return of the cause, the circuit court will appoint a commissioner to state the accounts, and to receive proof; and will take such other steps as may be proper to decide the controversy in conformity to the principles of the foregoing opinion.

Decree reversed, with costs.

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## Todd and Others *against* Wheeler and Others. CHANCERY.

[Mr. Turner and Messrs. Wickliffe and Wooley for Plaintiffs: Mr. Caperton and Mr. Owaley for Defendants.]

FROM THE CIRCUIT COURT FOR GARRARD COUNTY.

Chief Justice Robertson did not sit in this case: Judge NICHO-  
LAS delivered the Opinion of the Court.

October 16.

THIS suit in chancery was instituted by the appellants, in 1815, for the recovery of a large tract of land, by virtue of an entry made in 1782, the defendants holding under elder patents from Virginia, but their entries being either junior, or, as alleged, vague and illegal, or improperly surveyed.

The defendants, in their answers, set up and relied upon an adversary possession of more than twenty years before the institution of the suit. After depositions had been taken proving such possession, as to the whole or nearly the whole of the defendants, at the September term, 1819, the following order was entered:—

“This day came the parties by their counsel, and by their consent, the agreement heretofore entered into for giving Robert P. Letcher notice, is set aside, and the complainant Todd is to be notified for all the complainants, and the defendant Wheeler for all the defendants. The defendants waive so much of their answers as relates to the statute of limitations, and the complainants waive the right to remove this cause to the federal court.”

In 1825, the defendants moved to set aside so much of the order as purports to waive the benefit of the statute of limitations, and they were told by the judge then presiding to get ready on that point, and he would consider and dispose of it on the final hearing. This mo-

tion, as to the agreement, is approved here, on the ground that it was without consideration—a fatal concession upon a fallacious reciprocity, which must have been the result of mutual mistake, or undue advantage taken of the ignorance of a party. Nor did the defendants lose their right to be restored, by their *long acquiescence*, produced by misconception of their rights—not by a design to entrap their opponents.—See page 402-3.

By an agreement on record, 'the defendants waived so much of their answers as related to the statute of limitations, and the comp'ts waived their right to remove the cause to the federal court.' The statute of limitations was a safe defence: the cause could not have been removed to the federal court. The agreement was made in 1819. In '25, the defendants moved to set it aside, and in '27, filed affidavits, shewing that it was made, by one of their attorneys, without their knowledge, consent, or approbation. Upon the hearing of the cause, the court annulled the agreement, and dismissed the bill; and the decision

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tion, however, or any order concerning it, does not appear to have been entered of record.

At the June term, 1827, the defendants filed affidavits, stating that the order of September, 1819, had been entered by permission of one of their attorneys, without their knowledge, consent or approbation; and thereupon, at their instance, a rule was made upon the complainants to show cause, by the next term, why so much of said order as relates to a waiver of the statute should not be set aside. Without any direct action upon this rule, the cause was finally heard, at the next term, and by the final decree, it was ordered "that the agreement on record, purporting for the defendants a waiver of the lapse of time in their favor, be set aside and held for naught," and the bill was dismissed with costs.

It does not appear, that any of the defendants were in court when the agreement of 1819 was entered of record, or that any of them had assented thereto previous to its being made. It is proved, however, that during the same term, and perhaps the next day, Wheeler the principal defendant, and who acted as agent for the rest, was apprized of it, and it is but a just inference, that all the others were also apprized of it, shortly thereafter, or at least years before any motion was made to set it aside. It is inferable from the declarations of Wheeler, proved by complainants, that he was dissatisfied with what had been done by his attorney, but that either from a belief that the cause could have been removed to the federal court, or that after the agreement had been entered of record, it was no longer in his power to have it set aside, he made no effort to have it done, until the motion of 1825.

Circuit courts have a great discretion in regulating the intermediate steps of a suit which, unless for obvious abuse, this court will not curtail or control.

Where there has been an unreason-

The circuit courts have necessarily great discretion confided to them, in regulating all the intermediate steps of a suit preparatory to a final trial. It is a discretion which this court has never attempted to curtail or control, except for an obvious abuse of it. That the time elapsed between the recording of the agreement, and the application to set it aside was most unreasonably long, cannot well be denied. If there were any room to suspect a lying in wait to catch an undue advantage, it would con-

stitute an insurmountable objection of itself, to even an investigation of the claim to have it set aside. But there is no room for any such surmise. The proof of length of possession, as to most, if not all the defendants, was already made before the agreement, and as the burden of it lay on them, there was reason for their expediting rather than retarding its production. There was no attempt on the part of defendants, to impeach the motives of their attorney, or surmise that he had not acted as he supposed for the best, and if there had been, the length of their acquiescence should estop them on that score. Agreements between parties are frequently indispensable to the cheap and expeditious preparation of causes. Good faith in their execution should be required by the circuit courts, nor should a violation of them be allowed on any light or trivial grounds. It should never be allowed, when it is likely to work any ascertainable prejudice to the party opposing it, and which has been superinduced by the entering into the agreement.

On the other hand, we have no idea a court of justice should ever allow itself to be debased into a tribunal for meting out justice to litigants, according to the superior address and management of themselves or their attorneys, instead of the substantial merits of their cases. Some members of the profession are apt to conceive an advantage gained over an adversary by their superior adroitness, or his want of proper skill, as a species of acquisition both lawful and honorable—a kind of property—a spoil of war, they have won for their clients, and over which the court, as the arbiter of the lists, has no power of restitution. The courts are constantly compelled to be reminding them that they are the supervisors of no such arbitraments. It ought to have been long since understood, from the course of decision in this court, that the slip, oversight or blunder of an attorney, constitutes no cause of forfeiture of the property of the client, whilst it is still in the power of the court to allow a correction of the error without substantial prejudice to the other party. It is every day's practice, even in our common law courts, to per-

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al delay in presenting a preparatory motion, and it appears the mover has lain by, to catch an undue advantage, he should not be heard.

Agreements as to the preparation of causes, should be fairly observed, and should not be rescinded, by the court, where the opposing party will be prejudiced by having made the agreement unless it is adhered to.

Great latitude is allowed, both in chancery and at law, in making amendments, & correcting errors; and while the matter remains under the control of the court, it is not to be tolerated that a party shall lose his property, by the cunning and adroitness of parties or lawyers, on the one hand, or their mistakes, or inadvertencies, on the other.

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mit parties to amend and re-amend their pleadings, so long as it is necessary to the purposes of justice, until the cause is finally disposed of. This is allowed even for the perfecting of a plea of the statute of limitations, the idea of its being an odious defence having been long since exploded. Nothing is more common than to allow the withdrawal of a plea, and even after issue has been formed at one term, to allow a new issue to be presented, by an entire new plea at a subsequent term. All this, it is true, tends to great laxity of practice, and induces much trouble to the courts; but the power to allow such things to be done is indispensable to the administration of justice; the prevention of its abuse, is properly confided to the exercise of a sound discretion on the part of the courts of original jurisdiction. This court has often reversed for refusing leave to amend, seldom or never for allowing it.

We do not doubt, that it is within the discretion of a circuit court, to allow an amended answer to be filed, for the purpose of setting up the statute of limitations. But after that defence, or any other, has once been regularly made, and then voluntarily waived or withdrawn, it would be an indulgence savouring strongly of an abuse of discretion, if it were again allowed to be renewed, unless some strong reason was presented for so doing. It perhaps could never be properly done where the waiver was the result of a mutual agreement fairly made, and was based upon any thing like a consideration of benefit to the party waiving, or of prejudice to his adversary.

The principal question therefore is, whether this discretion has been so abused in this case, as to require a reversal on that ground.

It is obvious from the tenor and nature of the agreement of 1819, that the waiver of the statute of limitations, and the right to remove the cause to the federal court, were the considerations and inducements, the one of the other. But the complainants have left no room for doubt on this subject, by proving such to have been the fact. What the defendants surrendered was a defence perfectly



impregnable, and that secured to them their homes against the claim of the complainants. It was a certain defence, based upon proof then made. On the other hand, the complainants surrendered nothing of the least benefit to them, or prejudice to the defendants. It was the waiver of a right that did not exist. The complainants themselves, as well as the defendants, were citizens of Kentucky, and they had no right or power to remove the cause to the federal court. On the one side, then, the defendants gave seventeen hundred acres of valuable land; on the other the, complainants gave nothing, which unavoidably presents the subject in one of two aspects. The agreement was either the result of a mutual mistake as to the power of removal, both parties supposing it to exist; or the complainants were taking a most unconscionable advantage of the ignorance of their adversaries. It is unnecessary to suppose the defendants were the dupes of any artifice or management. When, then, the defendants asked leave so to amend their pleadings as to set up and rely upon the statute of limitations in their defence, and the complainants presented such an agreement as a bar to their right of so doing, did the court abuse its discretion in refusing to enforce an agreement so unfair, so unequal, so unconscionable? Was such an agreement ever enforced in any court of justice, in any way, or for any purpose? Did the chancellor ever refuse to rescind such a one? We conceive not. The complainants can be no way prejudiced thereby—that is, their situation is no worse, than if the agreement had never been made. They have lost nothing that ever was properly theirs. The only supposable prejudice to them, that has been suggested by counsel, is, that from the lapse of time they may have lost the witnesses, who might have disproved the proof, as to the length of possession, offered by the defendants. That is too vague a surmise of possible detriment, to constitute the basis of legal action. It must assume a shape more relevant, much more imposing than that. The presumption is a much more rational one, that the lapse of time has, in the loss of witnesses, prejudiced the defendants. At any rate if the complainants were to receive any ascertainable prejudice, it was their

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business to have made it manifest, under the rule to show cause. This they have not done. They have contented themselves, with proving that the agreement was entered of record with the assent of one of the attorneys, that the defendants were recently thereafter apprized of it, and rely exclusively upon their long subsequent acquiescence. That would no doubt be a strong circumstance in aid of any other. But a mere neglect to have the order set aside, superinduced, as it no doubt was, by ignorance on the part of the defendants, should not constitute a bar. There is no statutory bar, and we are no ways inclined to make one.

Where a def't has agreed to waive a matter of defence, and the court sets aside and annuls the agreement, there should be no final decree the same term: time should be allowed for preparation upon the issue, which had been waived and is reinstated.

We have been induced to discuss the point at some length, not on account of any intrinsic difficulty discovered in it, but from the large amount of property dependent upon it. We entertain no doubt the court did right in setting aside the order of 1819, and giving the defendants the benefit of their length of possession. But we think the court was premature in proceeding at the same term to a final decree. An opportunity should have been afforded the complainants, to make repellant proof as to the length of possession, and to bring their case, by allegation and proof, within any of the savings of the statute, provided they could do so. It would also have been more regular and proper, that the proof as to the possession taken by the defendants, since the order of 1819, should have been re-taken, in as much as there was, at the time of taking it, no issue involving the fact.

Decree reversed, with costs, and cause remanded for further proceedings consistent herewith.

Fall Term  
1833.**Ralls vs. Hughes and Hedges.**

CHANCERY.

[Mr. Apperson for Plaintiff: Mr. Hanson for Defendants.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Judge NICHOLAS delivered the Opinion of the Court.

October 16.

THIS is a suit in chancery instituted in 1830, by Mrs. Ralls, to obtain dower out of a tract of land, conveyed by her deceased husband, and which has been in the undisturbed occupancy of his alienees, from and before his death in 1796, till the present time. At his death, his widow resided in the state of Virginia, and continued to reside there until about twenty years before the institution of this suit, when she removed to this state. Whether her arrival here was full twenty years before the institution of the suit or not, there is some room to doubt, from the proof. Which way the proof preponderates we shall not determine, as it is not indispensable to a decision of the only point presented by the case; that is, the effect to be given to the lapse of time.

The right of dower is not embraced by the statutes of limitations. But, in chancery, *this*, like 'every new right of action in equity,' 'must be acted on at the utmost within twenty years.' Circumstances—such as would bring the case within the exceptions of the statute,—may constitute exceptions to this rule; as where the demandant was absent from the state when the right accrued, she may assert it at any time within ten years after her return.

By reference to the statutes, it will be found, that, from some strange omission, the right to dower is not embraced by any clause of the general law of limitation, either of England or this country. Though thirty four years had elapsed at the time of bringing this suit, from the accrual of the right, we can find no warrant for saying she was barred of her remedy at law. Whether she is barred of this remedy by bill in equity, is a different question, which, so far as we can ascertain, has not heretofore been distinctly presented and determined either here or in England. The course of modern adjudications, however, indicates, as we think, very distinctly, how it must be determined in both countries.

It is well settled, that where the remedies are concurrent, and there is a legal bar, it applies equally in chancery, and where the remedy is exclusively in chancery, if there would have been a bar at law, provided

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the right had been a legal, not an equitable one, the suit in chancery will be liable to the same bar. But this is not the full extent to which the decisions have gone. An attentive examination of the cases will show, that the chancellor has adopted for himself, a rule, in analogy to the limitation of the right of entry, which makes the lapse of twenty years an universal bar to every species of demand pursued in his court, with the exception of express continuing trusts and fraud. We do not purpose to go through a detailed statement, or even citation of those cases. To do so, at this day would be both tedious and unprofitable. We shall content ourselves with referring to the often before quoted language of Lord Redesdale, in the leading case of *Hovenden vs. Annesley*, 2 Scho. and Laf. "Every new right of action in equity that accrues to a party, whatever it may be, must be acted upon at the utmost within twenty years." This position has been recognised as sound, and cited with approbation by this court, in the leading case of *Reed &c. vs. Bullock*, Litt. Sel. Ca. 512, by the supreme court, in *Elmendorf vs. Taylor*, 10 Whea. and by Chancellor Kent, in *Kaine vs. Bloodgood*, 7 John. In *Reed vs. Bullock*, it was further said by this court, "that courts of equity from their first institution, had discountenanced stale claims and have always refused their aid to those who have supinely and negligently slept upon their titles. As soon as the statute of limitations of James I. was made, they eagerly adopted the limitations it prescribes, and it has long since become the settled rule of decisions in those courts. And as that statute has limited the time of making an entry upon land to twenty years, subject to certain exceptions, so courts of equity have invariably refused to sustain an equitable title where the cause of action accrued more than twenty years before suit brought, subject to the like exceptions."

This language of our predecessors is so apposite, and so conclusive of the question before us, that we preferred citing and adopting it, to clothing the same idea in terms of our own. The result is, that courts of equity not merely adopt the time prescribed by the statute, in

all cases where it applies expressly or by analogy, but even in those for which it has made no provision, on the general principle that vigilance and activity are necessary to call forth the extraordinary powers of the court, and that where a party has slept upon his claim for twenty years, good policy requires he should be left to his common law remedy. Concurring entirely in the wisdom of the policy that dictated the rule, we are so far from feeling any disposition to disregard or evade it for any purpose, that we should have felt inclined to originate it, if it had never heretofore been adopted.

Purposes of uniformity and conformity dictate the propriety of making all the exceptions contained in the statute a part of the rule. This would give the complainant only ten years after coming to this state, which was the removal of her first disability, even if the act of 1796 be taken as the test of disability, and the length of time allowed in consequence of it. Hence it is immaterial, as before remarked, to determine upon the proof, whether she had been twenty years in the state before the institution of her suit or not.


She might have been allowed ten years though the whole twenty had elapsed before coming to this state, for such are the terms of the act, but they have never been construed to give the twenty and ten years both complete where the disability was removed before the expiration of the twenty. On the contrary, wherever the ten added to the time previously expired make twenty, the bar is fixed.

The decree dismissing the bill must be affirmed with costs.

Fall Term  
1833.

*Ralls*  
vs.  
*Hughes.*

Fall Term  
1872.



*Writ of Right.*

## Sanders' Heirs vs. Buskirk.

[Mr. Sanders for Plaintiffs : Mr. Brown for Defendant.]

FROM THE CIRCUIT COURT FOR OWEN COUNTY.

October 17. CHIEF JUSTICE ROBERTSON delivered the original Opinion in this case, on the 10th of May, 1832. The cause having been submitted before Judge Nicholas came upon the bench, he took no part in the decision. The Opinion was afterwards suspended by a petition for a rehearing, until the present time, when the annexed supplemental Opinion was delivered by the Chief Justice, and the former Opinion confirmed.

Statement of the case,—evidence, admitted and excluded, and instructions in the court below.

THIS is a writ of right sued out by Anne T. Sanders and others against Lewis Buskirk

On the trial, upon the general issue as to the mere right, after the demandants had proved a regular deduction of legal title from the Commonwealth, and had also proved actual seizin within proper time, the tenant, without attempting to shew any perfect title in himself, or in any other person under whom he held, was permitted to read a record of a proceeding in favor of one John Norton against the demandants, from which it appeared, that the land in contest had been sold to satisfy a *feri facias* upon a judgment against them, in favor of Norton, and had been purchased by him, and that the sheriff had conveyed to him the title. He was also permitted to read a record of a motion, made by the demandants against Norton, for a quashal of the sale under the *feri facias*;—to all which the demandants excepted; and thereupon, they offered to prove that the sale of the land under execution, was collusive and fraudulent, as between Norton and the sheriff who made it. But the circuit court rejected the proffered proof, and instructed the jury, that the judgment overruling the motion to quash the sale, was conclusive as to its fairness and va-

lidity ; and that, if they believed that Buskirk was in possession of the land included in the sheriff's deed to Norton, they should find for him.

Verdict and judgment were consequently rendered for the tenant.

Though Buskirk seems not to have been a tenant of the freehold, yet, as that fact was pleadable in abatement only, (see *Green vs. Litter*,) it could not affect the right of the demandants to recover on the general issue—no plea in abatement having been filed.

It was permissible for the tenant to use the first record, which was read, for the purpose of shewing that the demandants had been divested of their title, and, therefore, had no right to the land.

But the record of the motion was inconclusive as to the alleged fraud ; and we have no doubt, that, unless they had been estopped by that record, the demandants had a right to avoid the effect of the sheriff's sale and of his decree, by proving that the sale was fraudulent and void. See *Hayden et al. vs. Dunlap, 3 Bibb*, 216.

The judgment on the motion to quash the sale, was not *conclusive* as to the fraud, because the record not only does not shew that the fraud was decided upon, or attempted to be proved, on that motion, but tends to prove that it was not then investigated, and could not have been, as the notice did not rely on that ground ; and this inference, from the record itself, is fortified by the opinion of this court on a writ of error to reverse the judgment of the circuit court on the motion. 4 *Mon.* 464.

As it does not appear that the imputed fraud in the sale was ever tried, the judgment overruling the motion to quash the sale on other grounds, should not conclude the demandants as to that matter ; even if, otherwise, it might be conclusive ; as to which latter point, we shall not express any opinion, as it is not necessary to do so.

Wherefore, the instruction of the circuit court was erroneous ; and consequently, the judgment must be reversed, and the cause remanded for a new trial.

Fall Term  
1822.

*Sander's h'rs*  
vs.  
*Buskirk.*

That the def't in a writ of right is not tenant of the freehold, is matter of abatement only.

Defendant in a writ of right may shew that demandant has been divested of his title, and so has no right to recover.

But the demandant may show, that the sale and deed purporting to divest him of title, was collusive, fraudulent and void.

A motion to set aside a sale, overruled, will not preclude a party from showing that the sale was fraudulent and void, upon other grounds, not contained in the notice, nor attempted to be proved on the trial of the motion. See the supplemental opinion, p. 412.

Fall Term  
1833.

*Sanders' h's*  
vs.  
*Buskirk.*

Points relied on  
for a rehearing.

SUPPLEMENTAL OPINION.

The reargument has not changed the former opinion of the court.

Two points have been urged by the counsel for the appellee:—*First*, that, as a writ of right cannot be revived in the circuit court, it was improper to revive this suit in this court, and that it should have gone off by abatement, in consequence of the death of one of the demandants, Walker Sanders, during the pendency of the appeal. *Second*, that the judgment on the motion to quash the sheriff's sale, was a bar to any impeachment of the sheriff's deed for fraud in the sale.

Neither point is tenable.

A writ of right abates in the circuit court by the death of a party, and there can be no revival. But an appeal, or writ of error, prosecuted to reverse a judgment on a writ of right, and abated by the death of a party, may be revived and prosecuted by his legal representative, or by a co-party.

*First*. Although the death of Walker Sanders might have abated the writ of right for the land, in the circuit court, nevertheless, his representatives, as well as the co-demandants, have an unquestionable right, if the judgment be erroneous, to reverse it, and get clear of the costs, and be reinstated. Can it be seriously doubted that, in a personal action, which dies with the person, for example, slander, an erroneous judgment may be reversed by the representative of either party who may have been prejudiced? The object of a reversal is not to prosecute the action of slander, but only to correct an injurious error, the right to do which does not die.

The right to have an erroneous judgment revised & corrected, never dies with the party, but survives to his representative, notwithstanding the cause of action upon which the judgment was rendered, would not have survived.

A judgment overruling a motion to quash a sale for irregu-

*Second*. We repeat, that fraud in the sale was not one of the causes assigned in the notice for quashing the sale; nor was it investigated on the hearing of the motion; and this obvious deduction from the record is "fortified" by the opinion of this court, in 4 Mon. 464, because it evidently gives the same construction to the grounds relied on in the motion to quash, and the same interpretation of the character of the investigation in the circuit court, as are now given by this court. A motion to quash a sale for irregularity—want of notice for example, surely would not bar a bill in chancery to set it aside for fraud. And it seems to us quite manifest, that a similar motion for the like cause would not preclude a party from defending his possession when sued on the



sheriff's deed, by proving that the sale was fraudulent, and the deed *therefore* void.

Whether a motion to quash a sale for fraud should be sustained after a motion to quash it for *irregularity* merely had been overruled, is a question which we need not now discuss; for a decision of it either way could not affect the question which we are called on to consider.

A motion to quash a sale, and the right to resist a deed made in consequence of the sale, are very different things. A party may not have a right to maintain a *motion to quash the sale*, and still may have a right to impeach the deed for fraud, and will always have that right until he shall have once attacked the deed for fraud and shall have failed, or until he shall have relinquished or lost the right by lapse of time.

Wherefore, the former opinion must remain unaltered.

Fall Term  
1833.

*Stansberry*  
vs.  
*Simmons.*

*larity*, will not preclude a party from impeaching the sale and deed for fraud, in another trial, where the question arises incidentally. *Ante* p. 411.

### Stansberry against Simmons.

CHANCERY.

[Mr. Chapeze for Plaintiff: Mr. Crittenden for Defendant.]

FROM THE COUNTY COURT OF BULLITT COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 17.

HUMPHREY SIMMONS, as only heir of Griffin Simmons, deceased, filed a bill in chancery against Benjamin Stansberry, for partition of a tract of land, which Griffin Simmons had owned, containing two hundred and seventy four acres, and one hundred and eighty four acres of which he had, in 1803, agreed to exchange with Stansberry, for a tract of a hundred acres, as shewn by the following article of agreement:—

Bill, and its object.

“Articles of agreement made and concluded upon, this 15th day of Febuary, 1803, between Benjamin

where he now lives with the improvements as it now is,—interpreted to entitle the covenantee to the specified quantity, without the surplus (ninety acres) afterwards ascertained to be in the tract.

A covenant, ‘to give said S. 184 acres of land

Fall Term  
1823.

*Stansberry*  
vs.  
*Simmons.*

Stansberry, of the one part, and Griffin Simmons, of the other part—B. Stansberry for his part, doth agree to give said Simmons a general warranty deed for one hundred acres of land that joins Samuel Simmons' land; for which said Griffin Simmons doth agree to give said B. Stansberry one hundred and eighty four acres of land, where he now lives, with the improvements as it now is—with his father's security, in a general warranty deed."

*B. Stansberry*, [Seal.]

*Griffin Simmons*, [Seal.]

Answer, & cross  
bill.

Stansberry insisted that he was entitled to the whole tract designated as one hundred and eighty four acres, although the quantity of that tract is ascertained to be two hundred and seventy four acres; but, making his answer a cross bill, prayed, in substance and effect, that in the event of a decree for partition, there should also be a decree for a specific execution, by a conveyance of the legal title for the one hundred and eighty four acres, which should be allotted, to him; or for a rescission of the contract.

Decree.

The circuit court made the partition, as sought by the bill, and decreed costs against Stansberry, but made no farther decree as to the title; and this writ of error is brought to reverse that decree.

Whenever a defendant resists the rightful claim of the complainant, he must pay costs.

There does not appear to be any sufficient ground for objecting to the partition. The agreement should not be interpreted as an obligation by Griffin Simmons for more than one hundred and eighty four acres; and there is no objection to the mode of partition as made and confirmed by the decree. And certainly, as Stansberry resisted a decree for partition, it was proper to decree costs against him.

A defendant resisting the suit of the heir, for the surplus of a tract of land, that the defendant held under

But the circuit court erred in not decreeing some relief on the cross bill.

Stansberry, in that cross bill, asks only for a deed, with security; to that he is entitled to the extent of the ancestor's agreement for the conveyance of a specific quantity, "with his father's security in a good warranty deed,"—makes his answer a cross bill for a specific execution, or for a rescission. The decree should require the heir to make a deed, with approved security, for the title, or, on his failure to do so, rescind the contract.

one hundred and eighty four acres allotted to him. When a defendant files a cross bill against the complainant *only*, an appeal or writ of error to reverse the decree on the original bill, brings up the cross bill, and the merits of the whole case as it stood in the circuit court—(*Stevenson and wife vs. Dunlap's heirs et al.* 7 Mon. 134)

Fall Term  
1833.

*Canterberry*  
vs.  
*Com'lt's &c.*

A cross bill against the complainant *only*, comes up by app. or writ of error to a decree on the original bill.

Decree reversed, with costs, and the cause remanded with instructions to require the defendant in error to make a deed of general warranty for the one hundred and eighty four acres, with approved security, or to rescind the contract if he shall fail to make such a conveyance.

## Canterberry *et al.* vs. The Commonwealth, for the use of Smith & Pearceall.

DEBT.

[Mr. McConnell for Plaintiffs : Mr. Combs for Defendants.]

FROM THE CIRCUIT COURT FOR LAWRENCE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 19.

THIS suit is brought for the benefit of Smith and Pearceall, merchants of Philadelphia, against a sheriff and the sureties in his official bond, for an alleged breach of his duty in failing to pay over paper of the Bank of the Commonwealth, which he had "in virtue of" a *feri facias* in their favor, collected as sheriff.

Suit against a sheriff and his sureties, for failing to pay over the com'th's paper, collected by execution.

The defendants pleaded, that the relators were non-residents, had no agent in the county in which the sheriff resided, and that no demand had been made prior to the institution of the suit. Issue having been concluded on that plea, the jury found a verdict against the sheriff and his sureties, upon which the court rendered a judgment ;—to reverse which, this writ of error is prosecuted.

The defence.

Fall Term  
1833.

*Canterberry*  
vs.  
*Com'lt'h &c.*

In a declaration against a sheriff for failing to pay over commonwealth's paper, an averment that he failed to pay "the amount," implies a charge of failing to pay in that paper, and is sufficient. And where it is averred, that he collected it "by virtue" of the ex'on, the legal deduction is, that he received it while the ex'on was in his hands, & in force.

A sheriff having collected money upon an ex'on, is bound to pay it over to the creditor, without a demand, if he resides in the county.

The attorney who recovered the judg't, may receive the money, & the sheriff will be justified in paying it to him.

If the creditor reside not in the county, the sheriff (though he may pay it to the attorney) is not bound to pay it to any one who does not produce an authority in writing from the creditor, for receiving it.

The sufficiency of the declaration is the first point presented for consideration.

The only objections which have been urged against the count, are, first that it avers that the sheriff failed to pay "*the amount*" which he had collected, but does not, in so many words, allege that he did not pay the Commonwealth paper which he had collected.—Second, that it avers that he collected the paper "in virtue" of the execution, but does not state expressly, that the collection was made whilst the execution was in full force, and gave him authority to make the amount for which it was issued.

Neither of these objections can be sustained.—"The amount" collected, imports the Commonwealth paper collected, and not specie, or any thing but what the execution entitled the sheriff to collect and the creditors to demand. And if the money was collected in virtue of the execution, the legal deduction is, that it was collected whilst the execution gave the sheriff legal authority to coerce the amount by means of the writ.

Upon the trial, the only proof of a demand was, that the attorney at law, who had obtained the judgment on which the execution had been issued, but who did not reside in the county in which the money was collected, had drawn an order for it on the sheriff, who did not pay it, or accept the order. And thereupon, the court refused to instruct the jury, on the motion of the defendants, that it was not the duty of the sheriff to pay the money on such a demand. And that refusal presents the next subject for revision by this court.

That an attorney at law, who obtains a judgment for his client, may have an implied and resulting authority to receive, for the client, the money or thing adjudged to him, we do not doubt. Such seems to be the common law of the state, as well as a clear deduction from a statute of 1796, 1 Dig. 495. The thirty fifth section of that act declares, "if any sheriff or other officer shall make return upon any writ of *feri facias* &c that he hath levied the debt, damages and costs, as in such writ required, or any part thereof, and shall not immediately pay the same to the party to whom the same is payable,

or his attorney," he shall be liable to a motion in the proper court for the amount, and fifteen per cent. damages.

The thirty sixth section of the same act provides that, when the *creditor* does not live in the county in which the money is collected on execution, unless he shall have appointed an agent in that county, or unless "demand (of the money) shall have been first made of the sheriff in his county, by the creditor, or some other person having a *written order from him*," no *judgment* shall be rendered against the sheriff for failing to pay the amount collected on the execution.

The twenty second section of the act of 1828, "to amend and reduce into one the execution laws of this state," provides that, when the execution creditor resides in any other county than that in which the money is collected, unless an agent in the latter county shall have been appointed and the fact of his appointment endorsed on the execution, the sheriff shall not be *liable to suit* for failing to pay over the amount collected on the execution until after the *creditor* shall have made, or "*caused*" to be made, a demand of the sheriff; and the twenty third section of the same act also recognises the *right* of the sheriff to pay the money to the attorney at law of the creditor, *if he shall choose to do so*.

Construing the thirty fifth and the thirty sixth sections of the act of 1796 together, so as to make them harmonize, and so as to give effect to each, the former should be interpreted to mean that, if the creditor reside in the county in which the sheriff lives, it shall be his (the sheriff's) *duty* to pay over, *without any demand*, the amount of the execution to which the creditor is entitled, and that a payment to either the creditor or his attorney will exonerate the officer;—and the latter section (36th) should be understood to mean that, when the creditor resides in any other county than that in which the sheriff lives, the sheriff shall not be bound to go out of his county to pay the money, nor *bound* to pay it to the attorney, (as he may not know who he is, or whether his impiled authority to collect may not have been re-

Fall Term  
1828.

*Canterberry*  
vs.  
*Com'lt &c.*

Fall Term  
1833.

Canterberry  
vs.  
Com'lh &c.

voked or countermanded,) and shall be liable *to suit* for non payment in the event *only* of a demand, in his county, by the creditor himself, or *by his agent constituted in writing*.

The twenty second section of the act of 1828 repeals only so much of the thirty fifth and thirty sixth sections of that of 1796, as is inconsistent with its provisions. The three sections taken, as they should be, *in pari materia*, the words, "shall have made or caused to be made a demand," should be understood to mean a demand in the sheriff's county, by the creditor, or by an agent appointed as the pre-existing law required: that is, by the creditor himself, and in writing, so that the sheriff may have evidence of his authority.

The conclusion is, that, though a sheriff may legally pay over to the attorney of the creditor, he is not liable for failing to do so, unless the attorney have authority in writing; and that, as, in this case, the attorney had no written authority to receive the money, the circuit court erred in withholding the instruction proposed by the counsel for the plaintiffs in error; for the sheriff was not liable to a suit for failing to pay the money, unless it had been demanded in his county by the creditors, or an agent constituted by writing.

The act, of '27, authorizing judgments for the nominal amount in bank notes, against officers who have collected such money, and failed to pay it over, does not apply to their sureties; the recovery in a suit where they are included, can be only for the value of the paper when it ought to have been paid, and interest on it.

The right to render a verdict and judgment for seventy dollars six and one fourth cents in specie, when the amount collected was only about sixty two dollars in notes of the bank of the Commonwealth, is the only matter remaining to be considered.

The second section of the act of 1827, does not apply to a suit against a sheriff and his sureties on the official bond. It provides only that, when an officer shall have collected Commonwealth paper, and failed to pay it over as he ought to have done, "any court or justice of the peace rendering judgment in such case against any such officer, shall render judgment for the bank paper so collected by said officer." This act applies only to a proceeding by motion or otherwise against the officer alone. It does not affect the liability of his sureties; that is fixed by the general law, and cannot exceed the

amount of injury or loss sustained by the creditor; and that is the value of the paper when it ought to have been paid, or when the breach of the bond occurred, and interest thereon. The judgment in such a case should be rendered for specie.

In this case there was no proof of the value of Commonwealth paper; and therefore, although the verdict and judgment may not be too high, nevertheless, the jury, having no legal criterion for ascertaining the amount to which the relators were entitled, had no authority for their verdict, and it cannot be sustained.

Wherefore the judgment is reversed, and the cause remanded for a new trial.

Fall Term  
1833.

Wilson  
vs.  
Percival.

Where the recovery is in specie, for a debt due in paper, there must be evidence of the value of the paper, or the verdict cannot be sustained.

## Wilson vs. Percival.

MOTION.

[Mr. Chapeze for Plaintiff: no appearance for defendant.]

FROM THE CIRCUIT COURT FOR HARDIN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 19.

ON a *feri facias* in favor of Wilson against Percival, the sheriff returned, that he had levied on enumerated articles of personal estate, on a slave, and on "all the land said Percival holds title to in Hardin county, quantity not precisely known."

On a *venditioni exponas* which was issued, the officer returned, that he had sold "all the land which the said James Percival held title to in Hardin county, in the following manner:—I first offered for sale the whole of the lands owned or claimed by said Percival, lying in Hardin county, and after the amount of the execu-

To a motion to set aside a sheriff's sale, for irregularity appearing in the return, all persons interested on the record, are parties. And the pl'tf in the execution (or any party) may prosecute his writ of error to the judgt on the motion.

A sheriff's sale being set aside,

the sale bond becomes invalid, and must, on motion, be quashed.—The sale and sale bond quashed, the creditor is remitted to his judgment, unaffected by the levy.

Fall Term  
1888.

*Wilson*  
vs.  
*Percival.*

tion was bid, I then cried it to him who would agree to take the least quantity of land, and pay the debt. After several bids, Horace Percival became the purchaser of one fifth of all said Percival's interest, undivided, according to quality and quantity, for the sum of two hundred and thirty four dollars and eighty one cents."

The land was sold on a credit of three months, and the purchaser (who was the son of the defendant in the execution,) gave his bond to Wilson (with two sureties,) for the amount bid for the interest which he bought.

Upon the motion of James Percival, the circuit court, from whose office the execution emanated, quashed the sale; and at a subsequent day of the same term, quashed the sale bond, on the motion of the principal obligor—Horace Percival.

As the grounds for quashing the sale appeared on the return upon the execution, all persons who were interested on the record were parties to the motion to quash. Wilson might have prosecuted a writ of error; but, not having done so, the order quashing the sale is conclusive.

The *sale* having been set aside, the *sale bond* was thereby invalidated; and *its* quashal *also*, on motion, was a natural and legal consequence. And therefore, as long as the order quashing the sale is unreversed, an enquiry into the presumed motives of James and Horace Percival would be unprofitable. Nor is it necessary to enquire whether Horace Percival should have been permitted to object to the validity of his bond, in consequence of a sale of a joint and undivided interest in *all* his father's undescribed lands in Hardin county, had not the father himself procured the quashal of the sale.

Wilson will be remitted to his judgment unaffected by the invalidation of the sale and sale bond.

The order quashing the bond, therefore, must be affirmed.



Fall Term.  
1833.

## Taylor *against* Porter.

CHANCERY.

[Messrs. Morehead and Brown for Appellant: Messrs. Marshall and Julian for Appellee.]

FROM THE CIRCUIT COURT FOR CAMPBELL COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

October 19.

IN 1810, James McGinnis executed his bond to Porter, for the conveyance of lots Nos. 89 and 90, in the town of Newport, "including the tan yard, dwelling house, currying shop and bark house, with all other improvements thereon, so soon as he should pay half the purchase money, to wit, four hundred and fifty dollars."

Sale of town lots, with improvements, by executory contract; bill to enjoin an unpaid part of the purchase money, and rescind the contract.

In 1826, Porter filed his bill, charging, in substance, that McGinnis had only an equitable title to one of the lots, and that he had no title whatever to the other; that McGinnis was dead; that Taylor had administered, and as administrator, had obtained judgments on the two last notes executed for a part of the purchase money; that he, Porter, had paid more than the half of the purchase money, and that he could obtain no title. Wherefore, he prayed for an injunction, dissolution of the contract, &c.

The circuit court perpetuated the injunction; rescinded the contract, and decreed the payment of five hundred and fifty three dollars to the complainant, Porter, (that being the amount of the purchase money paid by him,) subject to a deduction of three hundred dollars, as rent for the use of the premises while they were in the possession of Porter, who had abandoned the property, after using it about six years.

Decree of the circuit court.

From the above decree, Taylor prosecutes an appeal; and now insists, that it was erroneous to rescind the contract; but, if that be right, then the circuit court erred in not compelling the appellee to account for waste, and the dilapidation of the improvements, as well

Appeal.

Fall Term  
1833.

*Taylor*  
vs.  
*Porter.*

Neither a stranger, nor a vendor's administrator can take the place of a vendor, and require a vendee to pay purchase money, & take the title, which the vendor is unable to make. The vendor, or his legal representatives, as such, can alone make such title as the vendee will be compelled to accept.

as rent; and that the sum allowed for rent, is less than it should have been.

The contract was correctly rescinded by the circuit court. McGinnis was unable to make a title according to his contract. This seems to be admitted by Taylor; but he claims the right of controlling the lots in Newport, and disposing of them under authority derived from the original proprietor of the town; and an effort is made by him, to compel Porter to accept the title through him, and to pay the purchase money. The principle is unknown to this court, which will allow one man to substitute himself, as the vendor, in place of another, against the will of the vendee. The fact that Taylor has administered on the goods and chattels of McGinnis, cannot give him the right to substitute himself for McGinnis in the fulfilment of his contracts for land, by conveying the title directly to Porter. The appellee is not bound to accept the title from any one except his vendor, or his representatives, acting in their representative character. The insolvency of McGinnis, in this case, cannot change the rule. Taylor's warranty may be better than that of the representatives of McGinnis, but Porter is not bound to accept it, because he made no contract with Taylor.

When a vendee has made reasonable efforts to obtain the title, without success, has abandoned the possession, and filed his bill for rescission, it is too late to compel him to take the title, though ever so good.

It is useless to enquire whether the title to the lots is vested in the trustees of Newport, or to determine in whom it abides. It is sufficient that McGinnis had no title, and that his representatives, as such, have proved no title, in order to comply specifically with the contract. It is too late now to require Porter to accept a title, if it were entirely unexceptionable.

The questions raised relative to rent, waste and deterioration of the property by its use and abandonment, are more important.

It seems that Porter abandoned the property after using it about six years. Before abandoning the property, he had made one or more ineffectual efforts to obtain the title from McGinnis, who had removed from the state. Failing to obtain the title, he abandoned the property without giving any notice of the abandonment to McGinnis, then a nonresident.

It is not clear, in what state of repair the improvements were left. In 1827, according to the proof, the improvements had gone to destruction. The dwelling house had not been in tenantable order for the preceding seven years. It may be inferred from the evidence, that the lots, in their unimproved condition, were not worth more than a sixth part of the sum Porter agreed to give for them. The improvements, the tannery, constituted much the greater part of the value of the property. Upon these facts, the questions arise, whether Porter shall be compelled to pay rent, and if so, for what period of time; and whether he shall be compelled to account for the deterioration of the improvements.

The great principle which governs the chancellor in rescinding contracts, is to place the parties, if practicable, in *statu quo*. If that cannot be done, then he should come as near to it as possible, the nature and stipulations of the contract considered. If in this case, Porter had paid all the purchase money as it became due, and then asked for a rescission of the contract because he could not obtain a title, equity would require of McGinnis to repay the purchase money, and of Porter to restore the property. But so long as Porter held and used the property which he contracted for, he would have no right to demand interest on the money he had paid for it. Nor would McGinnis, under such circumstances, have a right to demand rent. This should be the rule so long as the parties continued to affirm the contract. Upon a disaffirmance by the vendee, if he continues in possession thereafter, he should account for rents, and is entitled to interest. The present, however, is not a case coming precisely within the operation of the foregoing rules.

Porter never paid the whole of the purchase money. McGinnis did not, therefore, obtain the full equivalent for the property, according to the terms of the contract. Consequently, could not have been indemnified for the use of the entire property, by the use of a part of the purchase money. While Porter enjoyed all he contracted for, McGinnis only enjoyed a part of the consideration he was to have, under the contract. This inequal-

Fall Term  
1833.

Taylor  
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Porter.

Condition of the  
estate.

The chancellor, in rescinding a contract, should place the parties as they were before the sale, or as nearly so as possible—possession to be restored; purchase money refunded.—So long as the parties abide by the contract, the vendee in possession is not chargeable with rents, nor entitled to interest on the money he has paid: after disaffirmance he is chargeable with rents, until he surrenders possession, and is entitled to interest until his money is refunded.—If his payment was partial only, there should be an equitable adjustment of rent and interest.

Fall Term  
1833.

*Taylor*  
vs.  
*Porter.*

A vendee is not required to go out of the state, to notify a non-resident vendor, that he renounces the contract—he may abandon the possession without giving notice.

ity should be made up. We deem it unnecessary, however, to go into a consideration of the principles applicable to this case, in order to fix the rule which should govern in ascertaining the extent of Porter's liability for rent, because it is very clear, that he has been charged as much as could be allowed under any rule we might adopt.

We are of opinion, that the circuit court correctly refused to charge Porter with rent after he had abandoned the property. At that time, McGinnis was a non-resident, and it was not the duty of Porter to go out of the state in pursuit of McGinnis, in order to notify him, that the contract was renounced; especially as it was the duty of McGinnis to make the title upon the payment of half the purchase money; wherein McGinnis was delinquent.

Upon the subject of waste, it is sufficient to remark, that there is no evidence which shews that Porter committed any.

An estate to be restored to the vendor, upon a rescission of a contract, on account of his failure to comply, and make the title—he must take in the condition in which it may be at the time of the restoration—without compensation for the casual destruction, decay or dilapidation of buildings and other improvements, not caused by any culpable act or omission of the vendee.—If he has sold and removed, or wantonly destroyed, or injured, the improvements, the vendor will be entitled to indemnity for the loss.

The deterioration of the property seems to have been the result of ordinary use and natural decay. It does not appear, that Porter made any repairs, nor is it shewn, what sum would have been sufficient to keep the premises in repair. Upon this branch of the case, the question is, shall Porter be compelled to restore the property in as good condition as it was in when he received it? If he does not, shall he account for the deterioration?

The vendor is in every case bound, upon the rescission of the contract, to return the whole of the purchase money. If he be robbed and lose it all, the hour after receiving it, or be deprived of it by any casualty whatever, still he is bound to restore the whole. If that be the case, does not reciprocity hold the vendee liable for the restoration of the property in as good a condition as it was in when he received possession? It might be regarded as a hard case on the part of a vendor, who was compelled to return a thousand, or ten thousand dollars, which he had received for a lot and the improvements on it, and to take back the lot without its improvements, when they constituted nine tenths of the value of the property, at the date of the sale. Suppose the improvements are destroyed by fire, is the vendee bound to re-

build, or to deduct the value of the improvements from the purchase money, when the contract is rescinded? We think the vendee is not bound to rebuild, or to account for the value of improvements, destroyed by casualty. Notwithstanding such destruction, he is bound to accept a title, provided the vendor complies with his contract, or tenders a performance in due time. It would be difficult to shew, that the vendor's failure to comply with the contract, could, in sound morals, give him an equitable claim to the value of the improvements which were destroyed in their use or by casualty, when the loss would fall upon the vendee, provided the vendor performed the contract, or could insist upon a specific execution before the chancellor. To allow the vendor to recover for improvements thus destroyed, after he was in default to such an extent as justified the rescission of the contract, would be to reward his wrong. Inasmuch, therefore, as the vendee is compelled to put up with the loss, where the vendor has a right to sell the property and observes the contract on his part, he ought not to abide by or sustain the loss, where the contract is not rescinded for any fault of his, but for the failure or inability of the vendor to perform it.

The vendee in possession is the *quasi* tenant of the vendor where the contract is executory. But still the vendee holds so far in his own right as to incur no legal obligation to make repairs, or to warrant or insure against casualties. How can it be told, that the same kind of casualty, or one more destructive, might not have happened, if the vendor had continued in possession and not made the sale? Would he keep the property in any better repair than his vendee? If casualties happened while he was possessed and the owner, or if he failed to repair and the property went to destruction, the loss would be his. There is no certainty, that the property would be safer remaining in the hands of the vendor, then in the possession of the vendee; and therefore, unless the injury can be traced to some culpable act or omission of the vendee producing the loss in the value of the improvements, we perceive no ground on which to charge him. If he set fire to them,

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*Porter.*

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*Porter.*

and consumed them, or if he removed and sold them,— in these and similar cases, as the deterioration would result from his voluntary act, he should be held responsible on the rescission of the contract for the value of the property he had thus destroyed, or used. But when, without his fault, a loss happens, it should fall on the vendor who has been faithless to his contract.

The restoration of the purchase money, in the same number of dollars and cents, may be far from doing exact justice to the vendee; because the rise of property in price, between the date of the contract and the time the money is restored, may be so great, that he could not purchase with the money a farm or land of half the intrinsic value of that he surrenders by rescinding the contract. The intrinsic value of lands and farms should be tested by their capacity to produce food for man and beast, and to sustain life in the greatest comfort with the least labor. A thousand dollars invested to day may lay the foundation for procuring a comfortable subsistence with ease. It may require two or five thousand dollars ten years hence, to accomplish the same thing. It cannot, therefore, be said, that the vendor has not occasioned a loss to the vendee, or that he has in every respect fully indemnified him by returning the purchase money. As the money may be returned at a time when it will not purchase half the estate contracted for from the true owner, and as the law never has, and probably never can, devise a rule to estimate the difference in profits resulting from investing money at this or that period, so as to give the vendee compensation for what may be termed the depreciation or deterioration in the value of money, reciprocity does not require, that the vendee should pay the vendor for improvements destroyed by accident, or worn out by use, or natural decay.

The decree must be affirmed, with costs.

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1823.

## Grady vs. Leavell.

APPEAL  
FROM A J. P.

[Messrs. Morehead and Brown for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *October 21.*

LEAVELL sold to Spilman a hogshead of tobacco, weighing sixteen hundred pounds, for three dollars a hundred; and agreed to deliver it at Grady's warehouse. It was afterwards delivered to Grady in his warehouse, and there deposited for Spilman, with the initials of his name marked upon it by Leavell. Shortly afterwards, Spilman having applied to Grady for the hogshead, and not being able to find it, Grady delivered to him, and he agreed to take, and did take, in lieu of it, another hogshead of Leavell's tobacco which had been deposited in the same warehouse, and which weighed about as much as the one which could not be found.

The hogshead so accepted by Spilman, was crossed at New Orleans, as inferior tobacco, and was therefore not worth more than from one dollar to a dollar and twenty five cents a hundred weight.

Leavell sued Grady, by warrant, for one hogshead of tobacco, and, upon an appeal to the circuit court, obtained a judgment against him for forty eight dollars and twelve cents.

Grady now insists that the judgment is erroneous—because, as his counsel argues, Leavell could recover only for the hogshead which was delivered to Spilman, in lieu of that which had been sold to him, and because the utmost value of the former did not exceed twenty dollars.

It may be admitted that, when Leavell had complied with his contract by delivering the hogshead at the warehouse for Spilman, it was the property of Spilman, who could have maintained detinue or trover for it.

A hdd. of tobacco was deposited in a warehouse, for the purchaser, who, unable to find it when wanted, took another belonging to the same seller, which proved to be not half as valuable:—the warehouse-man being accountable to, and sued by, the seller, for one of the two hdds. the jury were at liberty to infer that the property of that not found by the purchaser, reposed, when he took another in lieu of it, in the seller; and their verdict for the value of that one, is sustained.

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Clagget

vs.

Foree.

But, as he took another hogshead in lieu of it, and Leavell seems to have acquiesced, the Jury had a right to infer that the title to that which had been delivered for Spilman, revested in Leavell.

Wherefore the judgment must be affirmed.

TROVER.

## Clagget vs. Foree.

[Mr. Nuttall for Plaintiff: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR HENRY COUNTY.

October 21.

Chief Justice ROBERTSON delivered the Opinion of the Court.

An execution in the hands of an officer gives a lien upon the chattels of the defendant within the county— which is not lost by their temporary removal.— But those to which, not being in the county, the lien had never attached, until the debt sold them *bona fide*, do not become liable by being brought into the county by the purchaser.

In an action of trover for a gray horse, Foree obtained a judgment against Clagget for forty dollars in damages.

It appears from the bill of exceptions that, after a *fiert facias* against one Dun had been delivered to a constable of Henry county to execute, Dun removed from said county to the state of Indiana; that, in that state, Foree bought the gray horse from him, *bona fide*, and for a valuable consideration; and having brought the horse back to Henry county, before the return day of the *fiert facias*, the constable levied on the horse, and sold it to Clagget to satisfy the execution.

If when the execution came to the officer's hands, the horse was the property of Dun, and was in Henry county, or was the property of Dun and was in Henry county between that time and the sale to Foree, the lien given by law was not destroyed by the temporary absence from the county; and as the levy was made before the lien had expired, the intermediate purchase by Foree, invested him with no better title than what he would have acquired had there been no removal of the horse, or had the levy been made prior to the removal.

But there was no proof that Dun owned the horse in Kentucky, or that the horse was in Henry county when the execution came to the officer's hands. It does not



appear, therefore, that there was any lien on the horse at the date of Foree's purchase. Such a purchase should not be affected by an execution lien unless the lien be clearly established.

This court cannot therefore decide, that the circuit court erred in its instructions to the jury in favor of Foree.

But the judgment must be reversed on another ground. The jury was sworn to try the issue, and the record does not shew that any plea had been filed. For this error alone, the judgment is reversed, and the cause remanded for a new trial.

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*Ward*  
vs.  
*Everett.*

To swear the jury to try the issue, when there is no plea in, is error.

## Ward against Everett.

CHANCERY.

[Mr. Davis for Plaintiff: Mr. James Trimble for Defendant.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. October 21.

It seems to this court, that the circuit court erred in not perpetuating the injunction to the entire judgment.

As the judgment was for damages, interest did not accrue on it. And the payments since made, extinguished the principal sum adjudged for damages and costs.

*There having been such extinguishment at law*, the chancellor should not withhold a decree enjoining any further collection by execution, merely because he may think that, *in foro conscientie*, the complainant ought to have paid interest. *The judgment was satisfied*, and cannot for any part be enforced.

Nor should the chancellor have allowed one half per cent. on the bills of exchange. There is no proof to justify the allowance, and this court cannot know that, without any proof, the *lex mercatoria* gives one half per cent.

Decree reversed, and cause remanded, with instructions to perpetuate the injunction to the whole judgment.

The chancellor cannot allow interest on a judgment which does not bear interest at law—and must enjoin it, when the payments are equal to the damages and costs.

A charge for a commission, or discount, on a bill of exchange received in payment, must be proved—courts will not take notice of a mercantile usage, to allow it.

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1883.

APPEAL  
FROM A J. P.

## Long vs. Ray.

[Messrs. Morehead and Brown for Plaintiff: no appearance for Defendant]

FROM THE CIRCUIT COURT FOR EDMONSON COUNTY.

October 21. Judge UNDERWOOD delivered the Opinion of the Court.

Statement of the  
case.

RAY warranted Long and two others upon a note which on its face purported to be executed by the three. Upon a return of "*not found*," by the officer, as to the others, the justice rendered judgment against Long, who appealed to the circuit court. He there filed the plea of *non est factum*, and offered to sustain it by the testimony of those apparently bound with him. The court rejected their evidence, and the question is, whether they were competent witnesses.

The records of magistrates are to be construed with much liberality, and understood according to the apparent intention, however inaccurately expressed.

The witnesses offered were no parties to the record in the circuit court. The return of "*not found*," and the judgment of the justice against Long alone, with a statement upon the record of the justice, that the others were exonerated, because they had not been found, must be regarded as an abatement in respect to them. Great liberality must be extended in construing the informal orders of justices of the peace. If their orders are sufficiently intelligible to manifest their meaning, no matter how inaccurate the language, we shall give effect to their intentions so far as they conform to law.

A co-obligor, who is not sued, or as to whom the suit is abated, is a competent witness, unless it be shown that he is interested in the event of the pending trial. If he can use the record in a separate suit against himself, (to show payment of the debt or the like) or if he will be

The rule laid down by *Starkie*, Part iv, page 781, is, that "a party to the transaction out of which the action arises, and possessing a community of interest in the subject matter, is nevertheless competent, unless he be either a partner, or be immediately responsible over for the whole or part of the damages, in case the plaintiff recover, or unless he be interested in the record." It was not shewn, that the witnesses offered and rejected, were concerned, as partners, with Long in any manner, so as to render them incompetent. It was not shewn, that they were responsible over to Long, in case Ray recovered. Long may be the principal, and the wit-

nesses sureties only. If so, they would not be responsible for any part of the judgment rendered against Long. If the witnesses and Long were bound as principals, the exoneration of Long would throw the burden altogether on them. In that event, their evidence would operate against their interest. If Long was the surety for the witnesses, then, as they would be responsible to him for the costs as well as principal debt recovered, the witnesses would be incompetent, unless their liability was released by Long. *Hunter vs. Galewood*, 5 Mon. 268. *Bank of Limestone vs. Penick*, 5 Mon. 27. The case of *Pendleton vs. Speed*, 2 J. J. Marsh. 508, is not opposed in principle to the other cases, but entirely reconcilable with them. A co-obligor cannot be a witness in any case where he is "interested in the record." When a plea of payment, or accord and satisfaction, is pleaded, if the defence is sustained the entire obligation is discharged, and the obligee cannot succeed in any future action founded thereon, because the record would be conclusive evidence of the satisfaction of his demand. Because of this interest in the record, a co-obligor cannot be a witness when the attempt is made to render him competent by a release from the party defendant. It is an interest which does not grow out of a liability to the defendant, but is founded on a liability to the plaintiff, and therefore the defendant has no power to release it. This distinction has not been attended to by those who have attempted to extract the principle of the case of *Pendleton vs. Speed*.

It does not appear that the witnesses offered, have any interest in the record; and where the defence is founded exclusively on the plea of *non est factum*, it is difficult to perceive how they could have such an interest. If the issue is found for Long, the record will not, as it would upon a plea of payment or accord and satisfaction, exonerate those apparently bound with him.

From all that now appears, the court erred in rejecting the testimony, and in refusing to suffer an examination of the offered witnesses.

Wherefore, the judgment is reversed, with costs, and the cause remanded for a new trial.

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Long  
vs.  
Ray.

responsible over  
for the whole or  
any part of the  
judgment, he is  
not competent  
—without a re-  
lease from the  
party to whom  
he is, or will be,  
liable.

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Id 432  
119 96  
119 98  
119 99

CHANCERY.

## Baseman's Heirs *against* Batterton &c.

[Messrs. Wickliffe and Wooley for Appellants: Mr. Hanson for Appellees.]

FROM THE CIRCUIT COURT FOR BOURBON COUNTY.

October 21.

Judge NICHOLAS delivered the following Opinion and decision, of the majority of the court—from which Judge Underwood dissented.

History of the case—and decision (Judge Underwood dissenting,) that—

Where a party had obtained a decree (though a void one) for, and a conveyance in fee absolute, of the inheritance of his deceased wife, under the erroneous idea that he was heir of her son, who died shortly after his mother's death, and had sold the land, for a fair consideration, to one who had retained an undisturbed possession for 20 years—such alienation is protected in his title and possession, by lapse of time. The right of the true heirs to have the decree corrected accrued upon its rendition, was not suspended by the fact that the husband, as tenant by the courtesy, & his vendee, had a right to hold the land during his life; & was lost by a failure to assert in within twenty years.

BASEMEN died possessed of a tract of land which he held by virtue of a bond for the title from Owings; and commissioners appointed by the county court of Bourbon, in 1798, made partition of it between five of his children, of whom Catharine was one. Hopper afterwards married Catharine, and took possession of the portion allotted to her.

In 1803, they united with the others between whom the tract had been divided, in a suit in chancery against Owings, for a conveyance of the title to them respectively, according to the division as made. Pending the suit Catharine died, having first given birth to a child, who survived her only a few weeks. The suit was then abated as to her, and “revived as to her, in the name of Hopper, heir at law of Francis B. Hopper, (the child,) who was heir at law of said Catharine.” The bill was taken for confessed against Owings, upon proof of publication against him as a nonresident for eight weeks, and a decree rendered directing a conveyance by a commissioner, of the part allotted to Catharine, to be made to Hopper, as heir at law to his child, who was heir at law to Catharine, and of the other parts to the other children of Baseman, pursuant to the division—which was accordingly done; the commissioners deed to Hopper reciting, as the decree had done, that he was heir at law to the child, who was heir to the mother Catharine. Hopper continued in possession of the part thus conveyed to him until the spring 1807, when he sold it to Batterton, and put him in possession, who has retained it ever since, claiming it as his own. In August 1809, Hopper, having received payment from Batterton, conveyed it to him by deed warranting against Owings and Baseman's heirs. In 1827,

Hopper died, and shortly thereafter, in September, 1827, Baseman's heirs filed their bill in the nature of a bill of review against Batterton and the heirs of Hopper, alleging the mistake committed in the decree, in directing a conveyance in fee to Hopper of the part allotted to Catharine—he not being entitled thereto as heir to their infant child, but only to a life estate as tenant by the courtesy; and praying a revision and correction of the mistake in the decree. In May, 1829, they filed an amended bill, making the heirs and devisees of Owings parties, alleging the former decree against him to be void, as there was no service of process upon him actual, or constructive, the publication not having been legally made; pray title may be conveyed to them severally, for their several parts, according to the original division, and as to the part allotted to Catharine, that that may be conveyed to them jointly, and Batterton made to surrender the possession.

Batterton relies on the undisturbed possession in himself and Hopper, of upwards of twenty years before the institution of this suit, and that he is a purchaser for valuable consideration, without notice of the equity alleged by the complainants.

The sufficiency of the latter ground of defence need not be enquired into, as we think the first must avail and protect him.

It has been attempted to obviate the effect of the lapse of time, by asserting that, as Hopper originally took possession in right of his wife, he must have continued to hold after her death as tenant by the courtesy, and as such, he and his alienee had a right to hold during his life, and consequently that the limitation would not commence running until after his death.

All this might well be conceded, provided there had been no decree and conveyance pursuant to it, purporting to transfer to Hopper the absolute fee. The decree and conveyance do not purport to convey the title merely that was in Owings, but in affirming and executing the partition, necessarily transferred to Hopper, also the right of Baseman's heirs to the part conveyed to him. The right to correct the mistake in the decree accrued

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Baseman's  
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Boyd &c.

to Baseman's heirs the instant it was rendered, and it must, therefore, on every principle, be held to have been barred before the institution of this suit.

Whether, if the application to correct the decree, and for the relief now sought, had been made against Hopper alone, before the lapse of twenty years, but after the period allowed for bills of review, relief would have been granted, need not be determined.

The case is now presented in a very different attitude from that. Hopper and his alienee held the property upwards of twenty years in undisturbed possession before the institution of the suit.

However gross, therefore, may have been the error or mistake committed by the decree, in supposing the land had descended to Hopper from his infant child, we think that it is entirely too late, on the ground of such error or mistake merely, to disturb a purchaser from Hopper for a full and valuable consideration.

The decree must, therefore, be affirmed with costs—Judge Underwood dissenting.

CHANCERY.

## Price and Others *against* Boyd and Others.

[Mr. Simpson for Plaintiffs: Mr. Brock for Defendants.]

FROM THE CIRCUIT COURT FOR MADISON COUNTY.

October 22.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the case.

A *feri facias* in favor of Price against Boyd, was levied on a slave (George) in Boyd's possession, and was sold to satisfy the execution. Afterwards, the administrators of John Parks, deceased, brought an action of trover against Price, and the purchaser under the execution, and the sheriff who sold the slave.

They pleaded Price's judgment and execution and the sale under the execution, and averred, that the slave had been delivered to Boyd by the intestate (his father in law,) upon loan, more than five years prior to the levy; that there had been no reservation in writing of any right in Parks, nor recorded memorial of the loan; and that Boyd had continued, from the date of the loan to the levy, in the uninterrupted possession of the slave, without demand by suit or otherwise.

Upon an issue on that plea, verdict and judgment were rendered in favor of the administrators, for the value of the slave. On a writ of error to this court, that judgment was affirmed.

Afterwards, the defendants in the action of trover filed a bill to enjoin the judgment—alleging, among other things, the same matter which had been pleaded at law, and praying for a perpetuation of the injunction, and for general relief.

On the hearing, the circuit court dissolved the injunction and dismissed the bill. This writ of error is presented to reverse that decree.

The first question for consideration, is whether the plaintiffs in error had a right to reinvestigate in chancery the facts which were tried in the action at law.

The counsel for the plaintiffs insist, that the judgment is no bar, because, as he supposes, this court affirmed it on the ground that the plea was insufficient. But in this assumption he is, we think, mistaken. The only objection to the judgment which this court noticed, was one which had been made to the replication to the plea; and the opinion of this court, as rendered, was that, though the replication and plea were both defective, the defects in each were cured by the verdict. It does not become necessary, therefore, to consider whether, if this court had affirmed the judgment because the plea was insufficient, the chancellor would have had jurisdiction to hear and determine facts which could not have been effectually tried in the action of trover, upon an inappropriate and insufficient plea. The case at law was tried on the merits, and, *as having been thus tried*, the judgment

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Price &c.  
vs.  
Boyd &c.

Matters which have been tried and determined at law, cannot be reheard in chancery.

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Price &c.

vs.

Boyd &c.

There can be no decree, but that is based on allegations of the bill.

Where property is taken and sold under execution, and a stranger claims and recovers it, or its value, the party who loses it, has a remedy in chancery against the defendant in the ex'cn, whose debt was satisfied by the sale. The dismissal of a bill framed for one object, e. g. to compel one of the defendants to surrender property belonging to the other—will not bar another suit, on the same equity, framed for a different object, e. g. to subject the defendant's choses in action.

was affirmed by this court. The same matter cannot be reheard in chancery.

Nor can the next ground taken by the plaintiffs—alleged actual fraud—be available. There is no allegation that would authorize a decree for relief on that ground, so far as the slave is concerned. The bill does not allege that the intestate had ever given or sold the slave to Boyd, or that, as between themselves, the title had ever been vested in the latter.

But as the execution against Boyd had been satisfied by the sale of the slave to whom he had no title, the execution creditor had a right to apply to the chancellor for a decree relieving him from the consequences of the sale, and compelling Boyd to satisfy the execution by actual payment. *Jones vs. Henry et al.* 3 Lit. Rep. 428, *White vs. White et al.* 7 J. J. Mar.

The circuit court erred, therefore, in dismissing the bill.

But it does not appear that, in any other respect, the decree is erroneous. The bill does not allege that Boyd is insolvent, or that he has any choses in action which the chancellor could subject to the payment of Price's debt. It was not alleged that Boyd has any remaining interest in the estate of the intestate; on the contrary, it expressly charges that—"as things stand, *Boyd and wife got their portion of their father's estate.*" And, moreover, the answers affirm, that nothing is due to Boyd and wife from her father's estate. It does not become necessary, therefore, to enquire to what extent provision should be made for her and her children before a decree should be rendered for subjecting her husband's interest in her father's estate.

If Boyd be insolvent, and have choses in action, or equitable interests, which might be subjected by the chancellor, this suit will be no bar to a bill properly framed for the purpose of subjecting such interests—because no such relief could be given on the bill filed in this case, and it does not appear to have been drawn with a view to such relief.

Affirmance as to one defendant; reversal as to another—plaintiffs

The decree dismissing the bill as to Boyd, is reversed, and the cause remanded, with instructions to render a pay costs to the former, and recover costs of the latter.



decree against him for the amount still due in equity to Price.

The plaintiffs in error must pay to the administrators and heirs of John Parks, deceased, who were parties in this case, their costs in this court; and Boyd must pay to the plaintiffs their costs expended in prosecuting this writ of error.

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1833.

*Engleman's  
ex'rs  
vs.  
Engleman.*

## Engleman's Executors vs. Engleman.

ASSUMPSIT.

[Mr. Kincaid for Plaintiffs: Mr. Owsley for Defendant.]

FROM THE CIRCUIT COURT FOR LINCOLN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

October 22.

THIS is an action of assumpsit instituted by John Engleman against the executors of Simon Engleman, his deceased father, for work and labor by himself and his two slaves, for the decedent in his lifetime.

Grounds of the action.

Upon the trial, on the general issue, the plaintiff in the action proved that he had lived with his father until his death, which occurred in 1829; that he, (the plaintiff) was married in the spring of the year 1828, when he was a minor; that he was not twenty one years old until 1829; that he managed the farm of his father (whose estate was large) during the years 1828-9, and that both himself and two slaves, whom he got by his wife, worked on the farm.

Pl'tff's proof.

The executors proved that, after their testator's death and prior to the commencement of this suit, they and the said John, "to avoid a law suit," submitted his claim for compensation for services to the arbitration of David Shanks, Joseph Paxton and Adam Wilson, who awarded two hundred dollars for the year 1829.

Def't's proof.

On the foregoing proof, the counsel for the executors moved the court to instruct the jury, that, as the plaintiff in the action, was a minor during the year 1828, they should find against him, unless they believed that

Instructions—  
refused, and given.

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1838.

*Engleman's*  
*ex'rs.*

vs.

*Engleman.*

Verdict &amp; judgment.

A son may recover of his father's exors for labor done by himself and his slaves in his minority, upon proof, from which a promise of payment may be inferred, without proving an express promise. But the facts, that the son married in his minority brought his wife and two slaves obtained by her, to his father's, and continued in the management of the farm until he came of age—are not sufficient to justify a verdict for the son.

the testator had expressly promised to pay him for that year. The court overruled the motion, and instructed them that they had a right to infer a promise by the testator, "from all the circumstances," if they should believe that he requested his son to render the services.

The jury found a verdict for one hundred and sixty five dollars in damages, for which the court gave judgment, after overruling a motion for a new trial.

The circuit court did not err in overruling the motion for instruction. An express promise was not indispensable. But we are inclined to think, that the proof was insufficient to authorize the inference, that it was the understanding of the father and son that the former should pay the latter for the year 1828. The only fact which could, in any degree, tend to such a conclusion, was the marriage; but as that did not occur until sometime in the spring of that year, and as the son afterwards continued to live in the family and work and superintend as he had done before, it seems to us that the fact, that the father had consented that he might marry and still live in the family as he had done, together with his wife and her two slaves, is insufficient to justify the deduction that the father intended to give up his dominion over the son, or to pay him for his services, or for those of the two slaves, during the remnant of the year whilst he continued in minority. And, surely, there could be no ground for presuming a promise or an intention to pay for the son's services prior to his marriage. Wherefore, it is the opinion of this court, that the jury had not "a right to infer from all the circumstances" a promise by the father to pay the son for the year 1828.

As to a parol reference and award, one arbitrator testified that he believed that *re defence* to a portion of the plaintiff's demand, was sustained; the other testified that it was his impression that no award was made in relation to that portion—the evidence of the former, being *consistent with the submission*, and more positive, is conclusive: the award is held to be a bar to this, as well as to the other portion of the demand, and a verdict therefor, set aside.

other arbitrator swore only that it was his impression that "no award was made in relation" to the claim for 1828.

As the claim was entire, the rational deduction is, that the sum awarded for 1829 was intended as the whole compensation to which the son was deemed entitled for all the services for which he claimed compensation. Even had he presented distinct claims for each year, if, as we infer to have been the fact, the submission was general and unconditional, the legal deduction from the award of two hundred dollars for 1829, without any allusion to 1828, would be, that the whole claim, as submitted, had been considered and disposed of by the arbitrators. See *Cald. on Arbitration* 124-5. As there was no intimation that the submission was conditional, or *ita quod*, the jury had no right to infer that the claim for 1828, had not been considered, even had there been no positive testimony on that point; but it seems to us that Shanks' testimony should alone have been satisfactory had extrinsic proof been necessary. He believed that the infancy was relied on, and that therefore the claim for 1828 was not allowed. And the improbability that the claim for that year would have been forgotten by the claimant, or pretermitted by the arbitrators, (and more especially as the claim for both years seemed to have been submitted as a unit,) fortifies the belief of Shanks, and renders his testimony imposing. The "impression" of another of the arbitrators, that "no award was made" as to 1828, did not countervail the testimony of Shanks: *first*, because the import of that impression is indeterminate; for it would be difficult to decide whether the witness meant that the arbitrators did not investigate the claim for 1828, or that the award did not expressly mention it; and *second*, because, if he meant the former, the correctness of his impression is intrinsically less probable than that of Shanks. Shanks' testimony therefore fortifies the deduction of law from the character of the submission and award.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded for a new trial.

Fall Term  
1833.

Engleman's  
ex'rs  
vs.  
Engleman.

Several claims being referred, by a general submission, an award for plaintiff for one or more, silent as to the others, will be taken to be against him, as to the latter.

Fall Term

1833.

MOTION.

Newby and Wife vs. Perkins *et al*

[Mr. Turner for Plaintiffs: Mr. Owsley for Defendants.]

FROM THE MADISON COUNTY COURT.

October 23.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Statement of the facts.

ON the application of Thomas R. Perkins and others, who owned three tracts of land in Madison county, as coparcenors with Mrs. Newby, a notice was issued by the county court of said county, against Newby and his wife, to shew cause why commissioners should not be appointed to make partition of the lands thus held in parcenary.

The notice having been returned executed by a deputy sheriff, and Newby and wife failing to appear, commissioners were accordingly appointed to make partition; who reported that they had done so, and had also made a deed of partition. The court having approved the report and the deed, ordered that Newby and wife should pay the costs. They now seek a reversal of all the orders made by the county court.

A statute requiring notice to be given and the service of it to be proved in a particular mode, must be strictly pursued. A sheriff's return of "executed," may not be substituted, where the act says, there shall be an affidavit produced, that notice in writing has been given.

A proviso to the second section of the act of 1811, authorizing partition among heirs, declares that, "no application for partition shall be granted *unless* it appears by *affidavit produced* to the court; that the applicant has given reasonable written notice to every other person or persons interested in said partition, of the intended application." 2 Dig. 837.

There is no such proof of notification to Newby and wife, as that required by the only statute which authorizes partition among heirs by commissioners appointed by a county court. As the statute prescribes a special mode of making partition, its requisitions must be fulfilled. A notice in writing is required, and the proof of that notice is expressly prescribed. The required proof cannot be dispensed with. A written notice must be delivered to the party to be notified; an ordinary ser-

vice by an officer would be insufficient. The county court must have an affidavit of the delivery of such a notice—an official return—“*Executed*,” is not an affidavit, or such an one as the statute requires.

It is true, that the sheriffs were authorized by a statute of 1808, to serve any “notice which is required by law.”—But as the legislature, by the subsequent statute of 1811, prescribed a peculiar and exclusive mode of giving and of proving notice in the class of cases for which it provides, the act of 1808 does not apply to any such cases. This court cannot, by any allowable process of legal construction, make the act of 1811 embrace any other proof of service than that which it expressly requires. Nor can we decide that an ordinary official return is an *affidavit produced* to court.

Wherefore, the appointment of the commissioners, and the partition and deed made by them, were unauthorized.

The county court also erred in adjudging costs against the plaintiffs in error. The act of 1811 (*supra*) requires each parcener to contribute a proportionate amount of the compensation allowed to the commissioners; and does not contemplate any judgment for costs against any one, or in favor of any one, of the coparceners, when there is no controversy among them in the county court; and it does not appear that Newby and wife were opposed to a partition.

Wherefore, the order appointing the commissioners, is set aside, and the judgment for costs reversed.

Fall Term  
1833.

*Newby &c.*  
vs.  
*Perkins et al.*

Where an act requires a notice to be given and proved in a prescribed mode a previous general law, providing that any notice may be served by a sheriff, does not apply.

A partition among parceners made under an order of a county court, without legal notice to all interested, is unauthorized.

Parceners procuring partition of their land by order of a county court, pay their respective proportions of the fees—and no judgment for costs can be given for, or against, any of them, if there is no contest.

Fall Term

1833.



APPEAL

FROM A J. P.

**Haney vs. Sharp.**

[Messrs. Wickliffe and Wooley for Plaintiff : Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

October 25.

Chief Justice ROBERTSON delivered the Opinion of the Court.

The state tribunals have no jurisdiction of an action for a penalty, under the act of Congress relating to the census—that act does not attempt to confer such jurisdiction.

The courts of the state cannot take cognizance of a penal case arising under an act of Congress—*Query*, whether the legislation of both governments could give such jurisdiction—that of either one cannot.

The appellate jurisdiction of this court, is restricted to cases in which the inferior courts have cognizance. *A. v. c.* on a case of which no inferior court had jurisdiction, must be quashed—and no judgment for costs can be given.

SHARP proceeded against Haney, by warrant, for the penalty denounced by an act of Congress (*Session Acts of 1830, page 34.*) for a refusal to give to the marshal a list of his family, when required to do so, for completing the fifth census. Having failed in the country, he appealed to the circuit court, where he obtained a judgment against Haney for twenty dollars and costs.

Haney insists that the circuit court had no jurisdiction of the case;—and that is the opinion of this court.

Every government has an exclusive right to enforce its own penal laws; and had Congress possessed the power of conferring jurisdiction upon the state courts in penal cases, it has not attempted to do so in the class of cases of which this is one.

The courts of this state, deriving their jurisdiction, as they do, from the authority of the state, cannot take cognizance of a penal case arising under an act of Congress, unless some law of this commonwealth had given the right to do so, and the general government had, by an act of Congress, also consented. In such a case as this, no tribunal of the state has an inherent or concurrent jurisdiction; and therefore, without such co-operative legislation as that just suggested, the jurisdiction of the courts of the federal government must necessarily be exclusive. And whether any legislation could confer jurisdiction, in such cases, on state courts, depends on the proper construction of the federal and state constitutions, which we will not now consider, as there has been no legislation on the subject.

But as the “jurisdiction of this court is, by law, restricted to cases in which the inferior courts have cognizance,”

Dana.  
1d 442  
91 146

1 Dig: 381—therefore, as no inferior court of this state had cognizance over this case, the writ of error will not lie to this court. See *Beasley vs. Sims*, 4 Bibb, 268.

Fall Term  
1833.  
March  
vs.  
Talbott &c.

Wherefore, as neither the justice of the peace, nor the circuit court had jurisdiction, and this court, therefore, has none, the writ of error must be quashed without any judgment for costs.

### March against Talbott and Others.

[Mr. Chian for Plaintiff: Mr. Owsley for Defendants.]

FROM THE CIRCUIT COURT FOR JESSAMINE COUNTY.

THE circuit court, at October term, 1832, rendered a final decree, foreclosing the right in equity of the plaintiff, March, to redeem certain real and personal estate, which he had conveyed by several different mortgages, to Talbott, the senior mortgagee, McClure, the complainant below, and others; and directing a sale of the premises to satisfy the several mortgage debts.

An agreement, under seal, 'to waive all exceptions to a decree as it now stands,' is tantamount to a release of errors

In November following, Talbott, March and two others, entered into an agreement, signed and sealed by them, respectively, by which, after reciting the decree, and that March was dissatisfied therewith, they stipulate that the decree, with certain modifications as to the application of the proceeds of the sales, shall be carried into effect:—"And the said March doth further covenant and agree with the said Talbott, Gregg and Baker (owner of McClure's interest) to waive all exceptions to the said decree as it now stands."

This writ of error, with supersedeas, being afterwards prosecuted by March, the defendants appeared, and pleaded the above described agreement as a release of errors. The plaintiff cravedoyer, and demurred. But the court, upon consideration, overruled the demurrer; and the plaintiff failing to reply, judgment was rendered in bar of his writ.

October 24.

Fall Term

1833.

CHANCERY.

**Morgan's Heirs *against* Parker.**

[Mr. Chinn and Mr. Marshall for Plaintiffs : no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

**October 26.** Chief Justice ROBERTSON delivered the Opinion of the Court—  
in which Judge Underwood did not concur.

Case depending  
upon the validity  
of Fishback  
and Morgan's  
entry of 40,000  
acres, on Big-  
bone.

THE plaintiffs in error, claiming the superior equity, under a junior grant, sued the defendant for a relinquishment of his legal title, derived from the elder patent.

The defendant has not established his entry. That on which the plaintiffs rely is in itself sufficiently special, and depends for its validity on a previous entry, for forty thousand acres, in the names of Fishback and Morgan, in the following words :—

“ November 25th, 1783.

Jacob Fishback and Charles Morgan, as tenants in common, enter 40,000 acres of land on a treasury warrant &c beginning at the head of the main branch of the north fork of the big-bone-lick creek, and running north and south an equal distance—thence from each end of said line for quantity.”

The identity and notoriety of the main branch of the north fork of the big-bone-creek are the principal questions of controversy. The main branch of the north fork once established, there could have been no difficulty in finding the “head” of it.

The big-bone-lick creek derived its name from “big-bone-lick ;” through which one of its branches runs ; and the notoriety of both the lick and the creek, as thus denominated, at the date of the entry, is indisputably established. But the plaintiffs contend, that the branch running through the lick was known as the main branch of the north fork of the creek ; and the defendant insists, that *that* branch was not called or deemed the north



fork, or the main branch of that fork; but that the branch designated on the plat, by the name of the "*mud-lick fork*," was the *main* branch of north fork of "*big-bone-lick creek*."

The facts which conduce to prove, that the Mud-lick fork was known as the main branch of the north fork, may preponderate over those which tend to identify the other as the main branch. But this court having decided in *Buford vs. Marshall*, [in 1807—case not reported.] and in *Hawkins' heirs vs. Marshall*, 4 Mon. 285, that the branch now claimed by the plaintiffs to have been the main branch of the north fork, was, at the date of the entry, the true main branch of that fork, we are unwilling (Judge Underwood dissenting) to unsettle what has been so long settled, and by two opinions of this court rendered on the *same proof as that exhibited in this case*.

Wherefore, it is the opinion of a majority of the court, that the plaintiffs are entitled to relief; and consequently, the decree of the circuit court, dismissing their bill, must be reversed, and the cause remanded, with instructions to render a decree for the appellants, for a relinquishment of the appellee's elder legal title to the land in controversy, or so much thereof as the entry of the plaintiffs, when properly surveyed, includes.

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1833.

*Curle*  
vs.  
*Moore.*

This court having, by two decisions, settled the identity of an object called for in an entry, will, in subsequent cases, upon the same evidence, adhere to the former decisions—tho' the opposing evidence may seem to the present judges to preponderate.

### Curle vs. Moor.

ASSUMPSIT.

[Mr. Turner for Plaintiff: Mr. Owsley and Mr. Breck for Defendant.]

FROM THE CIRCUIT COURT FOR GARRARD COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court—in which Judge Nicholas did not concur.

October 29.

As the plea in this case may be deemed a plea in bar, though not sufficient as a plea in abatement, and as the matter pleaded may, if available at all, bar the action in this state—the only question for consideration, is the matter of the plea; and that is, whether a foreign administrator, who was never qualified in this state, is liable, as administrator, to an action at law in any court of this commonwealth. It is the opinion of a majority of

No action at law lies against a foreign administrator, who has not qualified in this state. The only remedy, if any, is by bill in chancery, upon appropriate facts.

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1833.

*The Com'ltth*  
vs.  
*Washington.*

the court, (Judge Nicholas dissenting,) that he is not liable to such a suit, according to the common law, or in virtue of any statutory modification of it. And that, if there be any remedy against him here, it is a suit in chancery, on appropriate facts shewing a right in equity to maintain a suit.

Wherefore, as the opinion accords with that of the circuit court, the judgment which this writ of error seeks to reverse, must be affirmed.

## PRESENTMENT

**The Commonwealth vs. Washington.**

[Atto. Gen. Morehead for the Commonwealth : no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR TODD COUNTY.

October 30.

Chief Justice ROBERTSON delivered the Opinion of the Court.

Prosecutions  
for obstructing  
roads are limited  
to six months

The bar to a  
penal prosecution  
need not be  
pleaded it is available  
on the trial; or to quash  
the presentment  
where it appears  
on its face.

THE circuit court having quashed a presentment against Joseph Washington, for obstructing a highway, the Commonwealth prosecutes this writ of error to reverse the judgment.

Whatever may have been the reason which influenced the judgment of the circuit court, the judgment itself was right. The presentment shewed, that more than six months had elapsed from the date of the fact charged, to the finding of the presentment. Such prosecutions are limited to six months; and it is not necessary to plead the limitation to a penal statute: the penalty cannot be enforced unless the proceeding for enforcing it shall be instituted within the time prescribed by law.

Wherefore, as the presentment itself shewed that Washington was not liable for the offence which it imputed to him, the circuit court did right in quashing it.

Fall Term  
1833.

## Bruce vs. Fox.

[The Plaintiff appearing in person, assisted by Mr. Haggin: Mr. Owsley  
for Defendant.]

MOTION.

FROM THE CIRCUIT COURT FOR LINCOLN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court—  
*Judge Nicholas*, dissenting upon the preliminary question of the  
jurisdiction of this court, and participating no further in the de-  
cision.

October 31.

At the February term 1833, of the Lincoln circuit court, Horatio Bruce read in court a commission, signed "*John Breathitt*," governor of this commonwealth, dated February 4th, 1833, purporting to appoint him attorney for the commonwealth, for the twelfth judicial district (including Lincoln county,) until the end of the next session of the legislature; and thereupon moved the court for leave to take the oaths prescribed by law, and to proceed to discharge the duties of the office.

Statement of the  
case each party  
claiming the  
office of Com-  
monwealth's at-  
torney.

Fountain T. Fox, who claimed the same office, opposed the motion, and read a commission signed, "*Thomas Metcalfe*," late governor of Kentucky, appointing him, with the advice and consent of the senate, commonwealth's attorney for the same district, during good behavior, and dated January the 15th, 1831; and also read a certified copy of an act of assembly, entitled—"An act continuing in force the law providing for the appointment of commonwealth's attorneys," approved December the 22nd, 1832.

Whereupon, the parties having agreed, that Fox had been duly qualified, and had continued to act as the attorney for the said district, and had never resigned his said commission, or removed from the district, and that Bruce was the same "*Horatio Bruce*," whose nomination for the same office had been rejected by the senate, in January, 1833, on the ground that, in the opinion of the senate, there was no vacancy—the court, after hearing argument, "*adjudged that Fountain T. Fox was in office as attorney for the commonwealth, and, as such, entitled to discharge the du-*

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1833.

Bruce  
vs.  
Fox.

ties;" and consequently, "overruled the motion made by Bruce, and refused to permit him to qualify as attorney for the commonwealth, under his commission."

To reverse that decision this writ of error is prosecuted—by consent.

This court has jurisdiction to revise the judgment of the circuit court, upon the motion of a party, asserting his appointment to the office of attorney for the com'th, & moving for leave to take the oaths of office, and enter upon the duties.

Judge Nicholas thinks the question settled otherwise. See his Dissent, p. 457.

As consent cannot give jurisdiction, the right of this court to take cognizance of the case, as presented, is a preliminary question which must be considered and settled.

"The court of appeals, except in cases otherwise directed in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state under such restrictions and regulations, not repugnant to this constitution, as may from time to time, be prescribed by law." (2nd. section of the 4th article of the constitution.)

The only statutory regulations materially affecting the question of jurisdiction in this case, are the following:—"In cases in which the inferior courts have cognizance"—"the court of appeals shall have appellate jurisdiction"—(11th section of an act of 1796; 1 Dig. 381.) "Writs of error shall, upon the demand of the person applying for the same, be issued, as a matter of right, except in those cases which may be brought before and determined by the district courts under the criminal jurisdiction." (13th section of the same act, p. 382—) "No appeal shall be granted to the court of appeals, or writ of error sued out from the court of appeals, except in cases where a final decree hath been pronounced, judgment rendered, or order made" (1st sec. of an act of 1804, 1 Dig 388.

The jurisdiction thus conferred, is very comprehensive, and has been curtailed by some statutory exceptions and restrictions; but none of these apply to this case.

The clause of the act giving the court of appeals jurisdiction "in cases in which the inferior cts. have cognizance" applies only to ju-

"Cases in which the inferior courts have cognizance," must be understood to include only cases in which the court acts *judicially*, by rendering some judgment or decree, or making some order affecting some personal or proprietary interest defined and regulated by law, and not depending on the *arbitrium* of the tribunal. Such dis-

cretionary or executive acts as neither establish any right, or decide any rule of law, or any principle, are not *judicial*; and therefore, are not revisable by this court.

Discretionary acts (such, for example, as an appointment of a clerk, or the removal of a guardian,) which do not establish or violate any right, defined and guaranteed by law, are not judicial, and are therefore, not directly revisable in this court.

But, in granting letters of administration, and in settling an administrator's accounts, (though *ex parte*,) the courts act *judicially*, because the law designates the person who shall be entitled to administration, and makes the settlement of an administrator's accounts in the county court *prima facie* evidence, which may essentially affect the rights of persons who may be interested.

Tested by these *criteria*, this case presents all the attributes of a *judicial* decision. If Bruce's commission invested him with the rights and privileges of the attorney for the twelfth district, he had a clear legal right to take the oaths of office in court, and to proceed, thereupon, to discharge the duties and exercise the powers incident to the station which had been allotted to him by the constituted authorities of the commonwealth, and for the benefit of the public; and, of course, the court had no right to overrule his motion, made at a proper time and in an appropriate manner. Fox opposed the motion because he claimed the office himself; and the record, made up by consent, may authorize the inference, that both Bruce and Fox were parties, and intended to to present a case in which the court should decide on their conflicting claims, and determine without the circuit, delay or expense of a formal suit, who was the rightful attorney for the commonwealth in that circuit. The court did so decide, and in consequence of that decision, overruled Bruce's motion, in doing which (if he was the lawful attorney,) it withheld from him a *legal right*, *disregarded the law*, and pronounced a *judgment*, or made a *judicial order*, *prejudicial to him*.

In such a case the court had no discretion; its duties were clearly defined and expressly prescribed by posi-

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*Bruce*  
vs.  
*Fox.*

*judicial* proceedings, not to discretionary or executive acts.

The executive or discretionary acts of inferior courts—such as an appointment of a clerk, or the removal of a guardian—are not subject to revision by the appellate court.

Where one who claims an office, moves a court in which the services are required, to be qualified and recognised as the proper officer, another person who claims the same office, may be admitted as a party to the motion; and either may have a writ of error to correct the judgment, to which the other may be made a defendant.

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Fox.

tive law; and, if it erred, the error was one of judgment as to the law and the rights of Bruce. We are disposed to think that Fox voluntarily made himself a party, for the purpose of expeditiously trying the disputed right, and, if the court had decided against him, and thereupon, deeming him not to be the proper prosecuting attorney of the court, had interdicted him, and had installed Bruce, he (Fox) might have prosecuted a writ of error.

One claiming an office may move the court where the services of the officer are required, for leave to take the oaths and proceed in the duties, may be heard *ex parte*, & may have a writ of error, *ex parte*, to reverse the decision upon his motion.

But even had Fox been no party in the circuit court, Bruce might, in our opinion, have prosecuted a writ of error to this court.

In defining a *suit* in court, it is generally said that there is "*actor, reus and judex*;" and generally this is true. But it is not universally true, that there can be no judgment, or judicial order, without both *actor* and *reus*. "*An action is a lawful demand of one's right*"—*Co. Lit.* 285, a. 2 *Institutes*, 40. and such a demand may be made judicially in an *ex parte* proceeding or application, or without any action; a legal right may be violated, or withheld erroneously, by a court acting merely *ex officio*.

If a circuit judge refuse to permit a licensed attorney to practice in his court, may he not, if injured thereby, have the error of the judge corrected? As this court has no original jurisdiction, a *mandamus* could not be issued to the circuit court. Then, is the attorney remediless? He has no remedy unless he can bring his case to this court by writ of error. If a circuit court, having jurisdiction by law to decide on applications for certificates for appropriating vacant land, had erroneously overruled an application, would the injured applicant have been without redress? His only remedy, would have been a writ of error. If a circuit judge, without sufficient cause, dishar a practising attorney, must he submit to the wrong, or may he complain to a superior and revising tribunal? A writ of error would be his only remedial resource.

In all these supposed cases, and in many others, altogether *ex parte*, the act of the judge is *judicial*; because it is an exercise of his judgment upon a legal right which does not depend on his *arbitrium*, but is defined

and protected by the laws of the land. And the party injured in any such case, may bring a writ of error to this court, to correct a judicial error to his prejudice. The writ of error is directed to the clerk of the inferior court, and only commands him to send the record to this court. If the case be *ex parte*, no summons will be issued. The object of the writ is to place the record before this court for revision of the judgment or judicial order. *Ex parte* writs of error are known in every revising court. And when this court spoke of "*actor, reus and judex*," in the cases of Allaway, in Bibb's Reports, [2 Bibb, 554] and of Taylor, in J. J. Marshall's [3. 401] it should be understood as only repeating the common definition of a *suit*, and as using it to fortify other considerations tending to shew that the cases it was then deciding on, were not such as should be deemed judicial. If a judicial case can be *ex parte* in the circuit court, it must be *ex parte* here.

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*Bruce*  
vs.  
*Fox.*

But Fox not only made himself a party in the circuit court, but has vountarily made himself a party in this court, and if he had done neither, he might have been made a party *in invito* here, because it was at his instance, and for his benefit that Bruce's motion was overruled, and had there been no defendant in this court, it is our opinion that Bruce might have prosecuted a writ of error. A suit for disturbance, could he have maintained such an action, could not operate directly on the circuit court, nor necessarily establish him in the functions of the office which he claims. Nor would the right to prosecute such a suit, or even its actual prosecution, affect the jurisdiction of this court in this case. The right to take cognizance of this case depends solely on another question: and that is, whether or not the circuit court acted judicially, or, in other words, rendered any judgment, or made any *judicial* and *final* order.

It seems to us, that it would be an anomaly in our jurisprudence if (conceding that Bruce is the legal attorney for the commonwealth) there should be no power in a tribunal of the last resort to correct an unauthorized act of the circuit court, operating to his prejudice and withholding from him his legal rights, asserted in

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*For.*

court, at a proper time, and in a proper manner, and opposed in form by another person, claiming for himself the same rights, and submitting the facts to the decision of the court. But in the opinion of this court, such an anomaly does not exist. The case is one of which the circuit court had "cognizance,"—in which it acted *judicially*—and in which too it rendered a decision between the conflicting claims of adversary parties, and made a *judicial* and *final* "order."

If this should be deemed an agreed case, Bruce could not make a similar motion again. But if he might have made a similar motion, to the same court, at a subsequent time, and if the circuit judge might, on such motion, have permitted him to take the required oaths and proceed in discharging the duties of the office, a repetition of the motion would have been disrespectful to the court; and it was not Bruce's duty to rely on such a hopeless resource. And, therefore, considering the order, as it purported to be, it should be deemed, not only a judicial, but a final order. It is not an interlocutory order.

Wherefore, a writ of error may be prosecuted to this court, for revising the opinion, and for correcting the order of the circuit court. This is the opinion of a majority of the court—Judge Nicholas dissenting.

The decision of the circuit court must, therefore, be considered.

A com'th's attorney, duly appointed, has a right to hold his office during good behaviour and the continuance of his office.

As we are not disposed to enquire into the propriety or constitutional validity of the acts of a co-ordinate department of the government, unless a proper case require a judicial opinion respecting them, we shall not determine, as we have been urged in argument to do, whether—admitting that, at the date of Bruce's commission, there was a vacancy in the office—the executive had a right to fill it, by such commission, without the concurrence of the Senate: for it is our opinion, that there was no vacancy in the office when Bruce was commissioned.

The constitution of Kentucky (*Article vi. Sec. 12th.*) declares, that, "the Attorney General and other attorneys for the Commonwealth, who receive a fixed annu-



al salary from the public treasury, judges and clerks of courts, justices of the peace, surveyors of lands, and all commissioned militia officers, shall hold their respective offices *during good behaviour and the continuance of their respective courts.*"

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If, according to a proper interpretation of this clause of the fundamental law, attorneys for the commonwealth, who draw a fixed annual salary from the public treasury, have a right to hold their offices during the continuance of their respective courts, provided they so long behave well, then, whether the law creating the office had expired or not, at the end of two years, Fox still had a constitutional right to the office, because the office, once created and filled, could not have been limited in its duration, otherwise than as it was limited by the supreme law. But it is unnecessary to intimate an opinion as to the true import and effect of the constitution in this particular, because we are of the opinion that, (conceding that attorneys for the commonwealth, like surveyors and militia officers, are not embraced in so much of the clause as declares that the tenure of office shall be coextensive with "*the continuance of their respective courts,*" and that that part of the section applies only to judges, justices of the peace and clerks of courts,) Fox had a constitutional right to hold his office during good behaviour and the continuance of his office, and that the office continued to exist when Bruce was commissioned, and still continues.

Bruce insists that the office was limited to two years; that, therefore, the commission, "*during good behaviour,*" should be understood as necessarily implying only good behaviour for two years, and that, consequently, Fox could not hold the office longer than two years without another commission. It seems to us, that this argument, though plausible, is not sound.

The operation of the statute, under which Fox was commissioned, was limited, by its terms, to two years; but the duration of the office which it created was not necessarily restricted to the same period. The office must continue as long as the law which created it shall con-

An office may be created by statute, the term of which is fixed by the constitution; and if the term be during good behaviour, the officer may hold it as long as the statute remains in force, and no longer—whether it be repealed, expires by its own limitation, or is continued in force by another act.

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tinue, and no longer. The legislature, when it declared that the law should continue in force for two years, meant no more and could have done no more, than to say that the law should continue for two years, *unless sooner repealed*, and should continue to operate no longer than two years, *unless*, before the expiration of that time, *its operation should be prolonged by the legislature*. Had the law been enacted without any legislative attempt to limit its operation, the office which it established would have continued to exist as long as the law should have remained in force, and no longer. A repeal of the law by the legislature next succeeding that which enacted it, would have abolished the office; and there being no office, there could be no officer; for, if the constitutional tenure be "*good behaviour*," and the continuance of the office, (and not the continuance of the circuit courts,) then, as the office is only legislative in its creation, it may be abolished by legislation, and when thus abrogated, the incumbent is, *ipso facto*, out of office. Declaring that the law should continue in force for two years, had no effect on the duration of the office. A repeal of the law before the expiration of the two years would have curtailed—a prolongation of it for four or ten years or indefinitely would have extended, the projected duration of the office. As repealing the law would abolish the office, continuing the law would continue the office. The commission was, as the constitution required that it should be, "*during good behaviour*." *The legislature had no power to prescribe any other condition or limitation*; and had it attempted to do so, its act, in that respect inconsistent with the supreme law, would have been inoperative and void. As the officer may, under the constitution, hold the office during good behaviour and the continuance of the office, if the law had been repealed or been permitted to expire, he would have been out of office; but as it was neither repealed, nor permitted to expire, but was continued in force by a subsequent statute enacted prior to the time fixed for its expiration by its own terms, the officer still has a right to hold the office during good behaviour and the continuance of the office.

And he holds his office under the law which created it, and under which he was commissioned. That law was not *reenacted* or *revived*; but was only continued in force by an act which repealed so much of it as prescribed its own limitation. The continuance of the law, and the consequent duration of the office, depend, not on the law itself, but altogether on legislative will, like all other offices of legislative creation. The effect of the limitation was *only that the office should continue for two years and no longer, unless the legislature should, in the mean time, repeal the law, or extend its operation for a longer term.* The office might not have continued two years, because the law might in the meantime, have been repealed. It may continue indefinitely or as long as the legislature shall deem expedient. It cannot therefore, with any propriety, be denominated or considered an office for two years, or for any other definite period beyond which it cannot extend.

But it is argued that the the appointing organs (the governor and senate) deemed the office one of two years duration only, and therefore selected officers who might not have been preferred had the duration of the office been unlimited, indefinite, or contingent. There are three answers to this argument: *first.* It is founded on a *petitio principii*. It assumes, as its basis, that which is to be proved; that is, that the governor and senate deemed the appointments which they made to be limited to two years. *Second.* The appointing organs of the government should be presumed to have known that, in virtue of the constitution, the officers whom they appointed would have a right to hold their offices during good behaviour and the continuance of their respective offices, at least; and that the duration of the offices was altogether contingent, because the legislature might abolish them by repealing the law before the expiration of its two years; or might, by forbearing to act, suffer them to expire with the expiration of the law; or might prolong their existence by continuing the life and operation of the law. *Third.* But the duration of the office does not depend on what the governor and senate may have

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thought when they filled it by making appointments. It depends on legislation and on the constitution. Had the law creating the offices contained no limitation, and had the appointments been made with a view to the indefinite duration of the offices, the legislature might, immediately afterwards, have repealed the law, or prescribed a limitation to its operation. And this the governor and senate should be presumed to have known also. When such appointments are made, they should be made with a view to the power of the legislature to curtail or prolong the duration of the offices, and must be presumed to have been so made. Had the law, like ordinary statutes, been indefinite as to its duration, the legislature, if dissatisfied with the offices or with the incumbents, might have abolished the offices; but if satisfied with both the offices and officers, the legislature, by forbearing to act, would have permitted them to continue. There is no essential difference between the case supposed and this case. In this case, the office has been continued by the *act* of the legislature. In the other case, the office would have continued in consequence of *forbearance to act*. But in each case, the continuation of the office would have been the offspring of *legislative will*. And if it be objected that, in the one case, the legislature alone may continue an officer in office, or legislate him out of office, the same objection may be urged with equal propriety and force in the other case. Such is the supreme will of the constituent body as expressed in the organic law; and it is not the province of this court to enquire into its prudence or its wisdom. Legislative discretion may be perverted, legislative power may be abused; but the discretion being conceded and the power admitted, the expediency of the legislative *will*, or the motives which may actuate that will in a given case, is not a fit or allowable subject of enquiry or investigation, in this forum. This court must deem the public good to have been the aim and end of every constitutional act of the legislature.

As, therefore, Fox had a constitutional right to hold his office during good behaviour and the continuance of the office, and as the office has never ceased to exist since he

was commissioned, there was no vacancy when Bruce was commissioned; and consequently, Bruce was never in office, and the circuit court decided correctly in overruling his motion.

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Wherefore, the order of the circuit court is approved and affirmed.

JUDGE NICHOLAS delivered the following dissentient Opinion, upon the question of jurisdiction involved in this case.

October 31.

If we conform to the decisions of this court, I do not perceive how we can take jurisdiction over this writ of error. It is a question depending entirely upon the proper construction to be given to the acts of assembly which regulate the jurisdiction of this court. Former decisions have settled that construction.

By the eleventh section of the act of 1796, 1 Dig. 381, appellate jurisdiction is given "in cases in which the inferior courts have cognizance;" and by the first section of the act of 1804, 1 Dig. 388, it is declared, that, "no appeal shall be granted to the court of appeals, or writ of error sued out from the court of appeals, except in cases where a final decree hath been pronounced, judgment rendered, or order made.

DISSENT—by Judge Nicholas—who conceives that the question, whether this court can take jurisdiction of this case, has been settled, in the negative, by two former decisions, & that it is now too late to reinvestigate the matter.

The cases of *Piat vs. Allaway*, 2 Bibb, 554, and *Taylor vs. Commonwealth*, 3 J. J. Mar. 401, have determined that these acts give us jurisdiction over no cases except those that are of a judicial nature. They also determine, that in every judicial case, there are regularly three persons—the actor, reus and judea.

There is no party defendant to the order or judgment here. Fox having opposed Bruce's motion did not necessarily make him a party defendant to the proceeding. Any other person had equal right and authority to oppose the motion, and would have met with the same success upon manifesting the same facts. Fox can be viewed in no other light than as a mere intruder, or at least as a mere *amicus curiæ*.

It is no agreed case, in which the parties have voluntarily submitted to the court, for a decision of their respect-

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ive rights to the office. It is a motion made by Bruce for permission to qualify, and discharge the duties of attorney for the commonwealth--the bill of exceptions which he took to the opinion of the court overruling his motion barely stating, that on the hearing of the motion, certain facts were admitted or agreed.

If Fox be a party defendant, then he would have had a right to prosecute a writ of error, to the order of court, provided Bruce had been allowed to qualify. The right must be mutual, or neither can have it.

The case of *Taylor vs. Commonwealth* is an express negation of any such right on the part of Fox. The county court determined that Taylor had vacated his office of clerk, and therefore, proceeded to appoint another person clerk, and it was held that Taylor could prosecute no writ of error, though he was in court opposing and excepting to his own expulsion and the admission of the other. It was held that there had been no judicial proceeding trying his right to the clerkship, and it is expressly said, that, "if the county court had made an order, declaring that he should not act as its clerk, because it deemed him not its clerk, he could maintain no writ of error to reverse such order." If the decision of the circuit court had been in Bruce's favor, then the position of Fox would have been identical with that in which it is here said Taylor could not have maintained a writ of error. The circumstance that, in the one case the question was of a clerkship, a vacancy in which the court had a right to fill, and in the other, of an attorneyship, to which the court had no power of appointment, can constitute no difference between the cases on this point. Until a vacancy took place, the county court had no more right to oust the old, and appoint a new clerk, than the circuit court had to appoint an attorney or admit a new one of the governor's appointing. The filling a vacancy in the office of clerk, is, no doubt, a purely ministerial act, not revisable in any way by a superior court. But the determination of the question whether there was a vacancy, was as much a judicial determination, as it is here, whether there was a vacancy

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in the office of attorney at the time Bruce was appointed, and there can be no doubt, that, if the county court erred in the determination that Taylor had vacated his office, their decision could have been, and would have been overhauled and corrected, by a proceeding under a *mandamus* or *quo warranto*. No error of judgment in executing the mere ministerial or executive duty of filling a vacancy actually existing, could have been overhauled and corrected in that or any other manner. The position of Fox, if the decision had been in favor of Bruce, would then in all respects, have been exactly the same with that in which it was held Taylor could not maintain a writ of error. The consequence is, that Fox would not have been allowed his writ of error, neither therefore, should it be allowed to Bruce.

In *Taylor vs. Commonwealth*, it is further said that, "in every writ of error, as well as judgment, there must be both *actor* and *reus*," and that, "in such a case as that, there can be only one party. It is there also said, that, "Beal who made the motion to appoint the clerk, should not be a party: his motion did not change the nature nor the effect of the act done by the court. It was not a proceeding against Taylor for his removal from office, and the order made was not a judgment of annulment." With still less propriety, can Fox's opposition to Bruce's motion, render it proper to sue out a writ of error against him in this case. If instead of opposing Bruce's motion, he had assented thereto, and even made the motion in Bruce's behalf, that could not have affected the decision of the court; it would still have been bound, without regard to that circumstance, to have ascertained from the fact whether Bruce was the officer of the commonwealth or not.

I have not thought it either necessary or proper to investigate the soundness of the construction given by the two decisions referred to, of the acts regulating the jurisdiction of this court. According to my understanding of my duty, it is too late now for me to reinvestigate that matter. A construction twice solemnly given to a statute, by decisions at such long intervals from each other, should

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not be disturbed on light grounds. The construction given by those decisions, as I understand them, is that this court has jurisdiction over no judicial proceeding, except where there is properly speaking an *actor, reus and judex*. One of those essential parties being wanting here, I must decline taking jurisdiction over this case.

I also doubt whether this be such a *final* order, within the meaning of the act of assembly, as that this court ought to take cognizance of it. The action of this court upon that order and affirming it, can give it no greater validity or efficacy than it would have without such action and affirmance. How far then was the order of the circuit court overruling Bruce's motion, final? Did it preclude him from renewing that motion at a subsequent term? It certainly could have no such effect. If there had been a change of judge in the circuit court, or if the same judge at a subsequent term had changed his opinion of Bruce's rights, he could legally and rightfully have been admitted to the exercise of the duties of the office, notwithstanding this order. I cannot recall any instance in which this court has ever taken appellate jurisdiction over any proceeding in an inferior court, where that proceeding was such that no final order or judgment was rendered, and that no order or judgment which could be rendered would be final and conclusive of the matter litigated. This court does revise decrees and orders dismissing bills and motions without prejudice; but in all such cases, if the dismissal had been absolute, it would have barred another bill or motion for the same matter. If this view of the subject be correct and no order or judgment rendered in this proceeding can or will be conclusive of Bruce's right, that of itself, constitutes an unanswerable argument, to prove that we ought not to have such jurisdiction conferred on us, and still more conclusively that we ought not to assume it. It would be an inappropriate application of the time and powers of this court, to render it the mere adviser of the circuit court. Its power should never be called into action, except where its action will conclude the matter litigated, and forever bar the same matter from



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being again litigated in the very same mode of proceeding. If there was in existence another court of original jurisdiction, superior to that of the circuit court, with power to control it by mandamus, the motion made by Bruce, would have been a necessary incipient step, which he would have been bound to take before he could obtain a mandamus. The adjudication upon his motion could not then have been considered as final and conclusive of his right, or even as an adjudication of his right, because that of itself would preclude him from obtaining the mandamus, inasmuch as it would have been the final determination of a court of competent jurisdiction, that he had no right. Neither could a writ of error to this court have been brought in that state of case, to reverse the order overruling his motion; for as it is said in *Taylor vs. Commonwealth*, wherever a mandamus lies, a writ of error does not.

But it is said, that because there is no such intermediate tribunal of superior original jurisdiction, to afford the redress by mandamus, that therefore this remedy by writ of error should be allowed, because of the supposed anomaly there would be, if Bruce had the right, and the circuit court erred in refusing the exercise of it to him. This supposed anomaly, and consequent reproach upon our institutions, is not perceived. The whole of our jurisdiction is made up of only such matters as the legislature chooses not to restrict us from; and if it thinks proper to leave this exclusively within the arbitrium of the courts of original jurisdiction, there is no other or further cause of just complaint, than there would be if our jurisdiction were restricted to sums over one hundred dollars. It is a matter purely within legislative discretion. That it should be left where it is, presents to my mind an instance of no such anomalous legislation, as would be presented of anomalous adjudication, provided this writ of error is allowed. The commonwealth's attorneys and the ordinary attorneys at law, stand with regard to the circuit courts, in the same attitude that the attorney general and the practitioners at our bar do towards this court. For

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errors of the courts to their prejudice as officers or attorneys, they all have the same mode and measure of redress, and none other.

When the legislature shall devise an appropriate remedy for the supposed defect, I will assist with pleasure in enforcing it. I am not willing to afford a cure by the adoption of a new principle of practice in this court, of wide range, the full extent of which is not foreseen.

# EJECTMENT.

## Wickliffe vs. Dorsey.

[Mr. Crittenden for Appellant : Mr. Cunningham for Appellee.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

November 1.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A decree is void where there has been no service of process. — Where there was service on some of the def'ts, not on others, the decree is not void as to the former, but inoperative as to the latter.

The court having no jurisdiction over the subject matter, its decree is a nullity—consent could not give the jurisdiction.

Where the ct. has jurisdiction of the subject matter, but not of the person—as where no defendant is

CHARLES A. WICKLIFFE brought a suit in chancery, in the Washington circuit court, for a decree compelling the heirs of Michael Troutman, deceased, to convey to him the legal title to a tract of land in Washington county, which their ancestor had covenanted to convey to Wickliffe's assignor. Upon a certificate of publication as to three of the heirs, and a return of service as to the others, none of whom lived in Washington, or were served with process in that county, the circuit court decreed a specific execution of the contract; and a commissioner, who had been appointed by the decree, made a conveyance to Wickliffe, for and in the names of all Troutman's heirs. Afterwards, Wickliffe, relying on the title thus derived, sued Dorsey in ejectment, for the purpose of obtaining the possession of the land. On the trial, the court rejected the record of Wickliffe's suit in chancery and the deed which had been made by the commissioner; and thereupon, verdict and judgment were rendered in favor of Dorsey; to reverse which, this appeal is prosecuted.

The only question which is deemed important, is, whether the circuit court erred in rejecting the chancery record and the deed.

The reason assigned for the rejection, is, that, as none of Troutman's heirs resided, or were served with process, in the county in which the bill was filed, and as also the certificate of publication was insufficient, the circuit court deemed the decree void for want of jurisdiction in the court that rendered it.

Had there been no service of process on any of the heirs, the decree would have been wholly *ex parte*, and therefore void; and so far as there was no service, actual or constructive, but so far only, it was inoperative, as it was by default, without answer or appearance. But as to such of the heirs as had been warned by actual service, the decree is not void, but erroneous and reversible only.

If the court that rendered the decree had not had jurisdiction over the *subject matter* of the bill, the decree would have been a nullity, because the court had no power to adjudicate; and in such a case, consent could not have given jurisdiction.

But, as the court had jurisdiction over the subject matter, and the only objection which could have been made to the prosecution of the suit in the circuit court of Washington, was altogether personal, and, therefore, might have been waived by answer or otherwise, the decree will be valid as long as it shall remain unreversed. Had the heirs of Troutman answered the bill, and either failed to object to the jurisdiction, or had expressly waived objection, the decree would not have been even erroneous or reversible for any defect of jurisdiction. Though they did not answer the bill, yet, most of them had been made parties by regular service of process, and chose to make no objection to a decree by the Washington circuit court; and consequently, though the decree may be reversible, it must be deemed valid until reversed; and, being thus valid, it cannot be incidentally or collaterally revised, or disregarded.

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found in the co. but the process is served elsewhere—the decree is not void; for the party might appear & submit to the jurisdiction.—If he fails to do so, the decree is merely erroneous, and binding until regularly reversed.

Where there is a decree against divers def'ts, for a conveyance, valid as to some, inoperative as to others—the commissioner's deed for the whole land passes the title of those, & those only, who are bound by the decree.

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The title of such of the heirs as had been regularly made parties was vested in Wickliffe by the decree and the commissioner's deed; and, as to their undivided interests, he had a right to recover; and therefore, had a right to use the record of the suit in chancery, and the commissioner's deed, to establish his claim to a judgment, and to shew the extent of his title.

Wherefore, the judgment must be reversed, and the cause remanded for a new trial.

COVENANT.

## McDonald vs. Ford.

[Mr. Haggin and Mr. Monroe for Plaintiff: Mr. Chinn and Mr. Combs for Defendant.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

November 1. Chief Justice ROBERTSON delivered the Opinion of the Court.

Suit, by assignee upon 'this indenture,' reciting a sale of a lot, and stipulating to make title—which is held to be *executory* merely, not a conveyance—the dec'n so treating it, good.

FORD sold to Steele a house and lot in Lexington, and delivered to him a writing, beginning, "*this indenture*," reciting that he had sold to him the house and lot, and concluding with a covenant to make a title, by deed of general warranty, on the payment of the whole consideration.

As assignee of that writing, McDonald sued Ford, in an action of covenant; and judgment was rendered in favor of Ford.

To reverse that judgment, this writ of error is prosecuted.

Two questions only will be considered by this court. *First*. Is the declaration good? *Second*. Is plea number 5 a bar to the action?

The declaration contains, in an appropriate form, every averment essential to the maintenance of the action; but it treats the written contract between the parties as an executory agreement altogether; and the counsel for

the defendant in error argues, that it is a conveyance with a covenant for further assurance.

The phraseology of the writing is unskilful and inappropriate. But, taking it all together, it should be understood to be, in every respect, an executory agreement, importing only that Ford had sold, and would convey to Steel, by deed of general warranty, the house and lot, on the payment of the entire consideration.

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The fifth plea avers, in substance, that, before Ford had notice of the assignment, "*Steel owed him a part of the consideration*"—to enforce which he filed a bill in chancery against Steel, praying for a decree subjecting the house and lot to the payment of the debt, and obtained a decree accordingly; in virtue of which, the house and lot had been sold, and a conveyance therefor made to the purchaser. A demurrer to the replication to this plea having been sustained, judgment was rendered in bar of the action, for want of a replication.

The circuit court erred in sustaining the demurrer; because, although the replication was defective, the plea itself was equally so. The plea does not aver that the bill was filed before the *assignment*, or even that the decree was obtained prior to notice of the assignment. Before notice of the assignment, Ford would have had a right to rescind the contract with Steel, or to take back the property, or, (which is in effect the same thing,) to obtain a decree for subjecting the house and lot to the payment of his debt, whereby his obligation to convey the legal title according to his covenant, would have been extinguished. As the decree was rendered at the instance, and for the benefit, of Ford, it can place him in no better condition than he would have stood in had he and Steel voluntarily rescinded their contract. Had they done so before the assignment, or before Ford had notice of it, such an arrangement would have exonerated Ford from liability on his covenant, either to Steel or his assignee.

But if, before the decree was rendered, Ford had notice of the assignment, he ought to have made the as-

should make the assignee a party to his bill to subject the land to the payment of the purchase money: otherwise, the sale may vest the title in a *bona fide* purchaser, leaving the covenantor liable to the assignee.

Plea—insufficient.

One bound to convey land may be exonerated, by an agreement to rescind, or by a decree and sale of the land to pay the consideration. But no such proceeding after he has notice of the assignment of his bond, will affect the assignee's rights.

The plea of a covenantor sued by an assignee, must show the facts pleaded occurred before notice of the assignment.

A covenantor, with notice of an assignment,

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signee a party, (unless the assignment was made *pendente lite*.) and had no right to obtain a decree absolving himself from his liability to the assignee. In that event the only effect of the decree and of the sale and conveyance under it, would be, that it might vest the title irrevocably in a *bona fide* purchaser without notice of the assignor's equity, and might render Ford liable to the assignee, without a payment or a tender of the whole consideration; because, if he put it out of his power to comply with his covenant, a payment or tender may have been dispensed with as a precedent condition.

The plea does not allege, that any part of the consideration remained due at the date of the assignment, or of the decree; and had it even contained such an averment, it would not have been better than it is, because that matter is only pleaded as inducement to the other and substantive matter of the plea, to wit, the suit in chancery, the decree, and the sale and conveyance under the decree.

Wherefore, the judgment of the circuit court must be reversed, and the cause remanded for further proceedings.

Information.

## The Commonwealth vs. Oldham.

[Atto. Gen. Morehead for Commonwealth: no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR OLDHAM COUNTY.

November 2.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A free man of color—tho' he cannot be a witness in any case, except where none but negroes, mulattoes, or indians are parties, may,

THE only question presented by the assignment of errors in this case, is, whether a free man of color may, by his own oath, require a white man to give security to keep the peace.

The second section of an act of 1798, 2 Dig. 1150, declares that "no negro or mulatto shall be a wit-

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ness,"—except in cases in which "negroes or mulattoes alone shall be parties;" and the second section of another act of the same session, 2 Dig. 1251, declares that, "no negro, mulatto, or Indian shall be admitted to give evidence but against or between negroes, mulattoes, or Indians." But these enactments were intended to apply only to testimony in suits pending between parties. They do not disqualify freemen of color to take an oath and swear to facts in every case in which a white man may be concerned.

A free man of color may sue or be sued; when plaintiff, he may swear for a continuance, or make affidavit for requiring bail; when defendant, he may swear to a plea of *non est factum*.

These and similar rights are incident to his freedom; and without them he would be virtually disfranchised. Any free man has an unquestionable right to bind any other free person to keep the peace, whenever he shall have sufficient cause for apprehending bodily harm from the malice of such person.

How shall a free man of color require a white man to keep the peace? Just as a white man may bind him to keep the peace—by swearing to such facts as may be necessary to shew that he has just cause for apprehending peril to his life or person. And when thus deposing he is not a witness in a "case" between parties; nor is he giving "evidence" against a white man, within the object or meaning of either of the foregoing sections of the acts of 1798. He is not a "witness," but a party swearing to what any other party may, for the like purpose, make an affidavit.

This interpretation of the statutory inhibitions is fortified by authority. See *Williams vs. Blincoc*, 5 *Littell's Reports*, 171.

Wherefore, it is the opinion of this court, that the circuit court erred in refusing to permit Johnson, a free man of color, to be examined on oath, upon his application to hold to further security Oldham, a white man, who had been bound to keep the peace, and had appeared in discharge of his recognisance.

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vs.  
*Oldham.*

by his own oath,  
require a white  
man to give security  
to keep the peace.

The oath or affidavit of a free man of color, party, may be received in any case where the oath or affidavit of a party is required or admissible.

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*Philips*  
vs.

*Harmon et al.*

When a party appears according to his recognisance and is discharged, it is thenceforth inoperative. No appeal or *w. e.* lies on the order discharging him.—The remedy, where one bound to keep the peace is improperly discharged, is by a new proceeding before a justice.

But this opinion cannot restate the parties. After Oldham had been discharged by the circuit court, he was *personally* out of court, and a reversal of the order for his discharge would not bring him back *personally* into court, as he stood when that order was erroneously made. Johnson's remedy, after the discharge, was to apply, as in the first instance, to a justice of the peace and obtain security by requiring another recognisance. After the discharge by the order of the court, Oldham was not liable to be proceeded against for a breach of his *recognisance*, nor was he liable to any proceeding *in personam* upon that recognisance.

Wherefore, as no practical good in this case, can result from a reversal of the order of the circuit court, and as it is a case in which an appeal is inappropriate, the appeal must be dismissed.

TRAVERSE.

### *Philips vs. Harmon et al.*

[Mr. Monroe for Plaintiff: Mr. Haggin for Defendant.]

FROM THE CIRCUIT COURT FOR BOONE COUNTY.

November 2.

Chief Justice ROBERTSON delivered the Opinion of the Court.

A traversor who appeared on the trial in the country, can not quash the inquisition for, or take any advantage of, the want of proper service of the warrant.

THIS is a traverse case.—After the papers had been regularly filed in the circuit court, the traversors, who had been defendants in the country, moved the court to quash the inquisition and the sheriff's return on the warrant, because, as they alleged, the service of the warrant was made a few feet beyond the boundary line of the county in which the warrant was returnable, and because, as also alleged, the warrant had not been executed three days prior to the inquisition. The court accordingly did quash the warrant and the inquisition, and gave a judgment against the traversor for costs.

Such a judgment cannot be sustained. As the traversors had appeared on the trial in the country, and had traversed the inquisition, and taken the case into the cir-



cuit court, they could not, in that court, object to the warrant, or even to a want of any service whatever.

This and analogous points have been so often decided by this court, and depend on such obvious principles, that it would be an useless waste of time to resort to reasoning or to authorities on the subject.

Judgment reversed, and cause remanded.

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*Thompson*  
vs.  
*Neal.*

## Thompson vs. Neal.

[Messrs. Morehead and Brown for Plaintiff ; Mr. Hord for Defendant.]

FROM THE CIRCUIT COURT FOR WASHINGTON COUNTY.

November 2

UPON the final hearing, this cause presented no "new or doubtful point" to be reported. But, at the appearance term, the defendant pleaded in abatement, "that the plaintiff did not on or before the commencement of this suit, file in the clerk's office of the court of appeals, where said suit was instituted and is now depending, bond with sufficient security, who is a resident of this state, conditioned for payment of all costs," &c.

Upon demurrer to this plea, it was argued, that, taken as true, it showed no cause for abating the suit; the plaintiff may have given bond with a surety who was a resident of this state when the writ of error was sued out, but is not so now; and the removal of the surety after giving bond, would be no cause of *abatement*. To which the defendant's counsel replied, that the plea pursued the language of the statute, and should be understood to mean that the plaintiff had given no security at all, for costs.

But *per curiam*—pleas of this description are not favored. With less strictness than is applicable to such pleas, this might be taken as true, and yet shew no cause for abating the suit. The demurrer must be sustained.

The defendant's counsel then asked leave to amend, but it was not allowed.

Pleas in abatement are to be construed strictly, and are not amendable. That bond for cost, with surety who is a resident, had not been given, is insufficient; as he may have been so when he bond was given.

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## CHANCERY

Id	470
89	418
Id	470
117	821

## Woodson's Administrators and Heirs *against* Scott.

[Mr. Chinn for Appellants: Mr. Haggin for Appellee.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

November 2. Judge NICHOLAS delivered the Opinion of the Court.

Statement of the  
case.

IN 1816. Woodson gave Scott his covenant for the conveyance of a tract of land, and put him in possession. The conveyance was to have been made upon payment of the first instalment of the purchase money, which was made in 1817 or 1818. Scott having paid the whole of the instalments, sued Woodson, in July 1824, for a failure to convey. Woodson afterwards tendered him a deed, in October, 1824, which Scott refused to accept. Woodson died, and the suit was revived against his administrators; who, together with his heirs, filed, in 1829, their bill, with injunction against further proceedings in the action at law, again tendering the deed executed by Woodson in his lifetime, and praying that Scott might be compelled to take it. On final hearing, in February, 1833, the injunction was dissolved and the bill dismissed.

It does not appear that Scott ever made a demand of a deed previous to the institution of his action at law, or that he has sustained any prejudice from not having received a deed at the time he was entitled to it.

The recovery of damages for the breach of a covenant to convey, extinguishes the obligation, and, in effect, rescinds the contract: the mere pendency of the suit has not that effect — hence, the attitude of the parties when

The circumstance, that the action at law had been commenced before any tender of a deed was made and before the bill was filed, presents of itself no obstacle to the relief prayed. It does not alter the attitude of the parties. It is not like the attitude in which they are placed by a judgment at law rescinding the contract.

In the one case, the chancellor finds the contract already annulled by the action of the court of law upon it, in the other, it still in full force. In the one, he is called upon to revive and enforce an extinct contract;

in the other, there is nothing but the ordinary question, which is addressed to his discretion in every application for specific performance, whether he will assist in enforcing the contract or not.

In determining that question, whilst he must ever feel it his duty to discountenance all unnecessary delay of the party seeking his aid, and especially where it has been prejudicial to the other party; yet he cannot but discriminate between that species of delay which has been the result of mere indolence or neglect unaccompanied, as here, by any injury to the party complaining of it, and that other which is wilful and designed, or at all indicative of a vascillation of purpose, as to a *bona fide* fulfilment of the contract. A knowledge of the want of that active vigilance and strict punctuality in fulfilling such contracts, on the part of the community generally, must compel him to overlook the delay in the one case, whilst his anxiety to discountenance fraud, or any semblance of bad faith, will cause him to refuse his aid in the other. The delay of the purchaser in the payment of the purchase money, is oftentimes much more prejudicial to the vendor, than a delay in the reception of the title can possibly be to the purchaser. Yet there is scarcely any amount of delay on the part of the purchaser, that will preclude him from the aid of the chancellor. The vendor is generally considered as fully compensated by the interest on his debt. Reciprocity, and the demands of equal justice, would seem, therefore, to require the chancellor to overlook delay on the part of the vendor, which is the result of mere supineness, and which has not prejudiced the vendee, in any ascertainable mode or degree. Such we believe to have been the course of decision on this subject. Some of the English cases treat the difficulty of clearing up and getting in a naked outstanding legal title, as in itself an excuse for delay. If a party can shew title at the hearing, it is of little consequence, that he had it not at the time of sale, or even at the filing of his bill. In the pithy dialect of the courts, time is not of the *essence* of the contract.

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one seeks a specific execution in chancery, is essentially different before, and after, a judgment at law.

When a vendor comes into chancery to compel his vendee to take the title, the cause of the breach and delay will be looked into: if it has been designed, with a view to profit by the noncompliance, especially if the vendee has sustained an injury by it, the vendor will not be assisted, but, if it has been fortuitous, or from mere neglect, and the vendee not injured, the delay will not of itself preclude the relief sought.

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Defect in Wood-  
son's title—pos-  
session for 47  
years.

After 20 years  
possession, an  
executory con-  
tract appearing,  
a conveyance  
may be presum-  
ed; and after  
a much longer  
time (37 years)  
the presumption  
may be acted  
upon with con-  
fidence, & will  
not be rebutted  
by the continu-  
ed nonresidence  
of the vendor.

There is, therefore, nothing in the bare length of time which was here suffered by Woodson to elapse before he offered to perform his contract, which should of itself prevent the contract from being enforced.

It remains to investigate the force of the only other objection urged against a specific enforcement of the contract:—that is an alleged want of sufficient title.

It is proved that Woodson and those under whom he claimed, had a continued, uninterrupted possession of the land, ever since 1786. The possession was originally taken under an executory contract with the patentee: In 1796, an attorney in fact of the devisee of the patentee attempted to convey the land to the assignee of the original purchaser, but from the manner of executing the deed, it was insufficient, according to previous decisions, to pass the title of the devisee. The attorney in fact was authorized to receive the purchase money, and his deed acknowledges its reception. There had, therefore, been, at the time of hearing the cause, not only an uninterrupted possession of about forty seven years, but for thirty seven years of the time the purchase money had been paid. In the general, twenty years is sufficient to create the presumption of a deed, where an executory contract can be shewn, upon which to base the presumption. After the lapse of forty seven, or even thirty seven, years, we think the presumption may be relied on, and acted upon, with the utmost confidence for every purpose.

But an alleged absence from this state of the devisee of the patentee, is relied upon to repel the presumption here. There is neither allegation nor proof of such absence. The only circumstance in proof, conducing to shew it, is the fact that the power of attorney from the devisee was executed in Virginia. That fact alone we deem wholly insufficient to prove a continued absence from this state; and if it did, or if such absence were otherwise satisfactorily made out, we should not be willing to concede, that the presumption of a conveyance growing out of such great length of undisturbed possession, could be so rebutted.

No other defect in the title has been suggested, nor have we been able to perceive any.

According to the case of *Cook vs. Hendricks*, 4 Mon. 500, the deed executed and tendered by Woodson, in his life time, though then refused, might be deemed as still sufficient, upon acceptance, to pass the title; but all difficulty on that score can be removed on the return of the cause, by a conveyance of the title from Woodson's heirs, through a commissioner. A decree to that effect, if Scott desires it, with a perpetuation of the injunction, will be an appropriate disposition of the cause.

The decree must be reversed, with costs, and the cause remanded, with directions for a decree pursuant hereto.

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Where a vendor makes a deed, and tenders it, and it is refused, and he dies; and afterwards, in a suit with his heirs, the vendee is compelled to accept the title, the same deed will do—but he may have the deed of a commissioner if he prefers it.

## Combs *against* Boswell and Others.

CHANCERY.

[Messrs. Morehead and Brown for Plaintiff: Mr. Chinn for Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

November 4.

SAMUEL R. COMBS, alleging partial payments, and claiming a set off, equal altogether to the aggregate amount of several promissory notes which he had given to Bushrod Boswell and others whilst they were copartners in trade, enjoined a judgment which they had obtained on one of the notes, and prayed for a surrender of the other notes and a perpetuation of the injunction. On the final hearing of the cause, the circuit court decreed a surrender of the notes which had not been merged in the judgment, and also decreed a partial perpetuation of the injunction to the judgment, and a dissolution as to the residue, with damages, and costs.

Statement of the case, and decision of the circuit court.

Combs now seeks the reversal of that decree, and has assigned the following errors:—

Errors assigned.

“*First.* The court erred in dissolving the injunction for any part of the sum enjoined.”

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"*Second.* The injunction was dissolved for too large a sum."

"*Third.* The damages decreed exceed ten per cent. on the amount enjoined."

"*Fourth.* The court erred in decreeing costs against the complainant."

The facts exhibited in the record, would not justify a perpetuation of the entire injunction; but, in other respects, the decree is, in the opinion of this court, erroneous as charged in the second, third and fourth errors as assigned.

Note of one partner, and agreement with him, relied on as a set off against the firm, and grounds on which it is resisted.

*First.* As to the second error, the only ground for controversy, is a note for one hundred and fifty dollars, which Bushrod Boswell had given to Combs, and for which the latter claims a credit on the judgment against him. The bill alleges, that the note was given for a sorrel horse, which Combs sold to Bushrod Boswell, and that the contract between the parties to the note was, that if, on a settlement, any thing should remain due from Combs to the firm of R. Boswell and company, Boswell's individual note for one hundred and fifty dollars, or so much thereof as should be necessary, should be applied as a credit on the copartnership debt. The joint answer of the defendants denies that there was any such agreement for a credit; insists that prior to the sale of the horse, the copartnership had been dissolved; denies the authority of Bushrod Boswell to bind his former associates by any such contract as that alleged, and avers that, upon the dissolution, Combs' notes had been delivered to B. Gratz, in trust for the creditors of the late firm.

The testimony of one witness prevails against the denial of an answer, sworn to only by a defendant who has no personal knowledge of the facts.

The agreement, as charged, must be deemed to be sufficiently established by proof; for although there is only one witness to that fact, yet, as the answer was sworn to by Gratz only, (who had no personal knowledge of the transaction,) one credible and positive witness, whose testimony is explicit and circumstantial, should be enough to sustain the allegation of the bill.

Other facts, as to the set off.

It appears, that the partnership had been dissolved, and that the notes on Combs had been deposited with Gratz, for collection, prior to the sale of the horse to

Bushrod Boswell. But there is not only neither proof nor even allegation, that the creditors were privy to the alleged trust, or ever consented to it; but there is neither proof nor allegation, that Combs had actual notice of the dissolution, nor that, if he had had such notice, he also knew that Bushrod Boswell had no authority to collect the debts of the company. After dissolution, the partnership still exists for the purpose of settling its unsettled affairs, and, to that extent, and that only, the preexisting authority of each partner still subsists, unless by the contract of dissolution, it shall have been surrendered; and consequently a *bona fide* payment to one of the partners, even after notice of the dissolution, would exonerate the debtor—*Gov on Part.* 287 to 312 *inclusive*. If such partner had, by the terms of the dissolution, or otherwise, surrendered his authority to collect the debts of the firm, nevertheless, a payment to him would bind his associates, unless the debtor, when he made such payment, had actual notice of the want of authority to receive. *Gov*, 309, and n. 1, and the authorities therein cited. Such notice might be inferred from circumstances. But there is no sufficient ground for such an inference in this case, especially as no such notice has been even alleged. If a binding trust had been confided to Gratz, that might have amounted to an implied surrender, by each partner, of authority to collect any of the debts. But, as before suggested, it does not sufficiently appear that there was such a trust, nor, if there had been, that Combs had notice of it. Moreover, after the alleged dissolution and deposite in trust, Combs had made large payments to Bushrod Boswell, which had been recognized, not only by Gratz, but by all the copartners.

Wherefore, the agreement respecting the hundred and fifty dollars, must be deemed as available to Combs against the judgment, as it would have been, had it been made before, instead of after, the dissolution of the partnership. As charged and as proved, the agreement should be deemed a valid arrangement for a contingent payment, *pro tanto*, and as binding on all the creditors as it would have been if it had been made directly with all

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*Combs*  
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The authority of each partner to settle unenclosed affairs of the firm, continues after the dissolution; and a payment made to one; an agreement made by one to set off a debt due the firm against his private debt, or other arrangement with one, for a settlement, binds all.—But if any partner, upon the dissolution, agrees to surrender this authority, settlements by him with those having notice of his agreement, will not bind the others. The notice may be inferred from circumstances.

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Failure to exhibit a note in a record in chancery—its existence not being denied, or assignment alleged, will not preclude the relief founded upon it.

of them; and consequently, no extraneous fact, such as insolvency, or want of effectual legal remedy, for the hundred and fifty dollars, is necessary to entitle Combs to a credit for that amount.

The note on Bushrod Boswell is not exhibited in the record, nor has its surrender been offered in the bill. But the answer does not deny its existence, or intimate that it was ever discharged, or assigned away. It should therefore still be deemed to be due to Combs, and a perpetuation of the injunction for the amount of it would extinguish Boswell's liability to Combs. It would be proper, however, as a precautionary measure to require the production and the surrender of the note. Wherefore, it seems to this court, that the circuit court erred in refusing to credit the judgment with the amount of Boswell's note to Combs.

*Second.* The damages seem to have been computed on the amount supposed to be due at the time of the decree, instead of the sum which, after deducting all proper credits, remained justly due when the judgment was enjoined. And in this there was also error.

*Third.* As Combs was entitled to, and obtained partial relief, he was entitled to a decree for costs, and was not liable to the defendants for costs. Doubtless the costs were decreed in this case, in consequence of a misconstruction of an awkward provision in the third section of an act of 1799, (2 Dig 670.) which is in these words:—"If the injunction is dissolved, *in whole or in part*, the complainant shall pay ten per cent. exclusive of legal interest, upon the sum for which it shall be dissolved *besides costs*." This provision applies to all dissolutions, whether on interlocutory motion, or on final hearing. And should be understood as meaning that upon dissolution, *on final hearing or before, or in whole or in part*, the complainant shall be liable for damages in addition to *whatever cost he may be legally liable for at the same time*. If the injunction be dissolved on motion, the complainant should pay ten per cent. and *the costs incident to the motion*. If he should, however, eventually succeed on the final hearing of his case, he would certainly be entitled to a decree for the costs of the suit. Should his injunction be whol-

The act declaring, that if an injunction is dissolved, in whole or in part, the comp't shall pay damages, *besides costs*, refers to the costs (of the motion &c.) for which comp't is liable at the time of the dissolution. If he obtains even a partial relief on the final hearing, he recovers his costs, and is liable for costs upon a total failure, as in other cases.



ly dissolved on final hearing, he would be liable for costs, as well as for ten per cent. damages. But if it should be perpetuated in part only, he should have a decree for costs, because, by prosecuting his suit he has, *in invito*, obtained some relief. Such, in the opinion of this court, is the more rational and consistent interpretation of the statute; but even if it were not so, still, as it has been the long and well established practical interpretation in this court, it should not now be shaken or questioned.

Wherefore, it is decreed by this court, that the decree of the circuit court be reversed, and the cause remanded, with instructions to render a decree in conformity with the principles of the foregoing opinion.

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*Breeding &c.*  
vs.  
*Finley &c.*

## Breeding and Others *against* Finley and Others.

CHANCERY.

[Messrs. Morehead & Brown for Plaintiffs: Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR CHRISTIAN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

November 4

THIS is a suit in chancery. Whilst the circuit court was considering exceptions that had been taken to an answer, the defendants made a motion to dismiss the bill, because one of the complainants had removed to Missouri about a year before that time, and the other two had removed to Texas since the preceding term of the court, and no security for costs had been given, as was required by the second section of an act of 1801, 1 Dig. 201. The counsel for the complainants asked time until the next morning to give the security; but the court refused to allow any indulgence, and thereupon directed a dismissal of the bill, and gave to the counsel for the defendants time until the next day to draw up a decree. On the next day, the decree dis-

No cause should be instantly dismissed, on motion, for want of security for costs. A rule is to be made for the plaintiff to give security within a reasonable time, according to the circumstances of the case, and if he fails to comply, the cause is then to be dismissed absolutely.

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*Breeding &c.*

vs.

*Finley &c.*

missing the bill was presented, and entered on the order book.

It seems to this court, that the circuit judge perverted the object and spirit of the act of 1801. Surely, according to the established doctrine in analogous cases, the complainants had a right to execute a bond for costs *nunc pro tunc*; and reasonable time should be allowed for the execution of such a bond. The time which was desired in this case was not unreasonable, especially as time was given to prepare a decree; equal indulgence to the other party would have been reasonable and just. Such reciprocity could not have been unreasonable, or unjust. A bond was not tendered on the next day after the leave was asked; but the court having decided that no indulgence should be allowed, and directed a dismissal of the bill, it would not have been proper to offer a bond afterwards.

But the proper course would have been to have made a rule to give security within a reasonable time. What would be reasonable time would depend on the time when the motion should happen to be made, and on other circumstances. But a suit should not be instantly dismissed, on motion, in any case. The statute authorizes a dismissal "*at any time.*" But that only means at any stage of the cause, and without limitation as to time. No chancellor should ever dismiss a bill for want of a bond for costs, without allowing *some* time after the motion. The only object of the statute was to afford security to the party sued. If he can get that within proper and reasonable time, he should not ask or desire more. The nonresident party may not know that security will be required or desired. He may not, therefore, deem it necessary to do an act of supererogation; or, through mere inadvertence, he may neglect to execute a bond. And in such cases, it would not be consistent with fairness, or with a proper interpretation of the statute of 1801, to give to the adversary party the election to lie in wait, and, at an unexpected moment, to require a peremptory and instantaneous dismissal of the suit. Let him ask security, and if he cannot get it without inconvenient delay, then let the suit be dis-

missed. The statute declares, it is true, that, unless a bond shall have been filed on or before the first day of the term next succeeding the removal of the complainant, the bill *may* be dismissed on *motion*. But the third section of an act of 1793, declared that no suit should be brought by a nonresident without filing a bond for costs; and that statute has never been construed to authorize a dismissal of the suit, upon motion, if the nonresident party should be willing to give security for the costs.

Decree reversed, and cause remanded, with instructions to receive a bond for costs, if a proper one shall be offered on the calling of the cause.

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1833.  
Johnson  
vs.  
Tool.

### Johnson against Tool.

CHANCERY.

[Mr. Richardson for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR OLDHAM COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

November 4.

THE question in this case, is, whether a vendor of land who sells "all his right, title and interest in and to five hundred acres of land, part of a survey of three thousand acres, made in the name of William Roberts, provided there is five hundred acres that is not sold by the said Roberts, and clear of the claim of Taylor and the claim cept as to Ann Tool, one of the heirs of said Roberts, is of Brown," and agrees to convey, without warranty, ex-bound, when the vendee calls upon him, to exhibit title, and shew an ability to convey, or, on failure, to submit to a rescission of the contract.

A vendor who sells, and covenants to convey, without warranty, *all his right, title and interest* in land, is bound to exhibit his title, and show that he has *some title* (tho' not the best) or *some right*, which he can convey—else the contract may be rescinded.

It is contended, that a deed by the vendor, using terms to convey all his "*right, title and interest*," would be a compliance with the contract on his part, whether he had or had not, in point of fact, any interest or title; and that the execution of such a deed is all that the vendee can require. We are of a different opinion. An undertaking to convey all the vendor's "*right, title and interest*," but without general warranty, implies that he

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has some *right, title and interest* which can constitute the subject of a contract, and which can pass by the conveyance to the vendee. If the vendor has no "*right, title or interest*," the stipulation on his part amounts to a nullity. It cannot be presumed, that a vendee would ever engage to pay money for nothing. We are, therefore, of opinion, that it was incumbent on the vendor to exhibit a title, and shew himself able to make it to the vendee. We do not mean that the vendor was bound to shew the best title, nor even a title regularly derived from the commonwealth. But we think he was bound to present such a state of case as would show that he at least had some *right*. A naked possession might be such a *right* as would, if transferred and conveyed, satisfy the covenant on his part. But the vendor has not shewn that much.

A covenantor, stipulating to convey so many acres of land out of a large tract, provided there is so much unsold and free of such and such claims, may select it where he will in the tract — but must lay it off, and show that it is unsold, and free of the specified interference

The vendor exhibits a deed from Ann Tool to himself, without warranty, purporting to convey her interest, as heir at law of William Roberts, in a survey of three thousand acres, &c. bearing date subsequent to the execution of his title bond; and it is contended that this deed is such evidence of a *right, title or interest* in the vendor, as will enable him to comply with his contract. We think it insufficient. It is true that the contract between the parties, recognizes Ann Tool as *one of the heirs* of William Roberts, and therefore Johnson may be estopped to deny that fact. But conceding that Ann Tool had an interest, as heir, in the three thousand acres, and that her interest, whatever it was, passed by the deed to the defendant in error, still it does not appear that the interest so passed amounted to one acre, excluding the quantity sold by Roberts in his life time, and clear of the claims of Taylor and Brown. It is manifest from the covenant, that Roberts had sold part of his survey, and that the claims of Taylor and Brown interfered with it. The vendee, Johnson, was to get five hundred acres, at fifty cents per acre, if so much could be had outside of the interferences with Taylor and Brown, and not to interfere with purchasers from Roberts. The boundary was not specified in the covenant, which should embrace the land sold. The vendor might lay it off any

where in the survey provided he avoided the interferences aforesaid. It was his duty to do it. The vendee might not have the necessary information to enable him to do it. The vendor failed to designate any land, and failed to shew title for one acre. At least this court does not know that his title, excluding the exceptions, covers a single acre which he can convey.

Under the foregoing circumstances, we think the injunction should have been perpetuated, and the contract rescinded. Decree reversed, with costs, and cause remanded for a decree in conformity to this opinion.

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*Gaines et al.*

vs.

*Buford.*

## *Doe ex dem. Gaines et al. vs. Buford.*

[Messrs. Wickliffe and Wooley and Messrs. Morehead and Brown for Appellant: Mr. Haggin for Appellee.]

FROM THE CIRCUIT COURT FOR CAMPBELL COUNTY.

JUDGE UNDERWOOD and JUDGE NICHOLAS delivered separate Opinions in this case—in the decision of which the Chief Justice, being related to one of the parties, took no share.

November 4.

JUDGE UNDERWOOD:—The plaintiff relied on a grant to John Harvie, dated in 1786; the defendant on a grant to Bartlett Bennett, dated in 1789, and continued possession, by settlement and residence of tenants, for seven years prior to the institution of suit.

Titles of the respective parties.

The evidence concluded, the plaintiff moved the court for various instructions. Among them were the following, which the court refused to give:—

1. That an adverse possession of the land in controversy, by a residence thereon of the tenant or tenants of the defendant, for a period less than twenty years, does not bar the right of the plaintiff to recover in this action.

The possession of a tenant is available to his landlord, for protection under the 7 years law. See p. 483.

2. That the possession in part, by the junior patentee, must be in the name of the whole, or the entry of those

ters upon a part of the land, unless his entry is in the name of the whole; is restricted to his actual occupancy; and the right of entry of the elder patentee, and those claiming under him, upon the residue, is not tolled. See p. 483.

The possession of a junior patentee who enters upon a part of the land, is restricted to his actual occupancy; and the right of entry of the elder patentee, and those claiming under him, upon the residue, is not tolled. See p. 483.

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claiming under the elder patentee is not tolled, except as to so much land as was in the actual occupancy of the junior patentee.

2. That so much of the act entitled an act to revive and amend the champerty and maintenance law and more effectually to save the *bona fide* occupants of lands within this commonwealth, passed and approved January 7th, 1824, which subjects to forfeiture the lands of both residents and nonresidents for failing to improve them, according to the provisions of the eighth section of said act, is repugnant and contrary to the constitution of the United States, as being in violation of the compact between the states of Virginia and Kentucky.

Instructions considered irrelevant, and the question not decided here. See p. 501.

4. That the certificate of the auditor of the forfeiture of three thousand and thirty five acres of land in the name of Philip Duvall, is not sufficient in law, without further testimony, to shew that a part of the land in controversy is thereby vested in the commonwealth.

5. That the certificate of the auditor, offered in evidence by the defendant, shewing the forfeiture of three thousand and thirty five acres of land to the commonwealth, in the name of *Philip*, is not sufficient to prove that any part of *William Duvall's* interest in the twelve thousand one hundred and forty eight acres, is thereby vested in the Commonwealth, unless it is first shewn that the title of said *William* had been previously conveyed to said *Philip Duvall*.

6. That if the jury believe from the evidence, that James M. Gaines, one of the lessors of the plaintiff, had under fence and cultivation within the limits of Harvie's patent for twelve thousand one hundred and forty eight acres, subsequent to the conveyance of Barrett and wife to said Gaines, and prior to the 1st day of August, 1825, more than five acres for every thousand contained in said patent, then the claim, right, title and interest of said Gaines was not forfeited under the act of champerty and maintenance, passed and approved January 7th, 1824.

Upon the application of the defendant, the court gave the following instructions:—

1. That if the jury believe from the evidence, that

the said tract of land patented to J. Harvie, and claimed by the lessors of the plaintiff, was not, on or before the 1st day of August, 1825, demonstrated, made public, and accompanied by the actual cultivation and improvement thereof, by clearing, fencing and tending at least five acres of said tract, and by belting or chopping the trees, except such as were required for rails to enclose the same, in at least ten acres for every thousand acres in said tract, knit to and connected with the claim, interest or title to said tract of land set up by the lessors of the plaintiff, then the said claim, right, title and interest of said lessors of the plaintiff is forfeited, and they must find for the defendant.

2. That if the jury shall believe from the evidence, that the undivided moiety of said tract of land patented to J. Harvie, which was conveyed to said Duvall, by said deed to Barrett and Duvall, has been forfeited, or stricken off to the state for the nonpayment of the taxes, and has not been redeemed, then they must find for the defendant as to that undivided moiety.

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Instructions considered irrelevant, and the question not decided here. See p. 501.

3. That the jury must find for the defendant, as in case of a nonsuit, on all the demises in said plaintiff's declaration, except the demise from James M. Gaines, and on that demise, if they can find for said plaintiff as to any part, it can only be for one undivided moiety.

A tenant in common cannot recover upon a joint demise.— See p. 501.

Other instructions were given on the application of the defendant. But it is unnecessary to copy them, as their correctness does not admit of doubt. The jury found for the defendant, and the plaintiff has appealed.

The points now agitated grow out of the instructions asked by the plaintiff, and refused; and those given on the application of the defendant.

Instruction No. 1, asked by the plaintiff, was correctly refused. The case of *White vs. Bates* (not reported) settles the point. Page 481.

Instruction No. 2, asked by the plaintiff, contains the law. It should have been given, unless it phraseology rendered it abstract. A small change, making it apply to the facts of the case and names of the parties, will obviate every objection to it. Page 481.

Instructions No. 3 and 6, asked by the plaintiff, and

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No. 1, asked for by the defendant, may be considered together. From the manner they were disposed of, it is clear that the court resolved to enforce the forfeiture contemplated by the act of the 7th January, 1824, for a failure to improve as required by the eighth section. Instruction No. 6, uses the expression, "*five acres for every thousand.*" The evidence would have justified the insertion of *ten* instead of *five*. It may be that an error has been committed in transcribing, but as the instruction reads, it is not authorized by the statute, and was therefore correctly refused.

The provisions of 'an act to revive and amend the champerty and maintenance law' &c. of Jan. 7, 1824, which declare that the lands of proprietors and claimants shall be forfeited to the commonwealth, unless certain improvements are made thereon, as required by the act, are unconstitutional & void.—See the reasoning and concurrent conclusion of Judge Nicholas, *post*.

Instructions 3 and 1 fairly present the question, whether the eighth section of the act of 1824, to "revive and amend the champerty and maintenance law, and more effectually to secure the *bona fide* occupants of land within this commonwealth," is compatible with the constitutions of the United States and of this state. This section forfeits to the commonwealth, without inquisition, or office found, or judgment, every tract of land of more than one hundred acres, unless the proprietor thereof should, if it be wood land, cause five acres to be cleared, fenced and tended, and ten acres for every thousand to be belted before the 1st of August, 1825. If the greater part of the land be in the barrens, then ten acres for every thousand were required to be enclosed by good fence. The proviso to the last section of the act probably intended to exempt "flooded land on which no settlement can be made" from forfeiture, although not improved as required by the eighth section. That proviso exonerates "*citizen proprietors*" residing on, or in possession of one of their surveys, from cultivating or improving any other of their lands on which there is no conflicting claim or title.

The preamble to the eighth section explains the object of the legislature in forfeiting lands for nonimprovement. The design was to counteract the opinion and decision of the supreme court of the United States relative to those acts, usually called occupant laws, which provide a remedy for securing to occupants compensation for their improvements, when evicted. Fully to accomplish the object, the ninth section vests the title,



which may be forfeited by the operation of the eighth section in the person holding possession. The tenth section provides, in substance, that any person may escape the effects of the forfeiture, by engaging under hand and seal to abide by the provisions of various acts of assembly, the titles of which are given; or in other words, the forfeiture is released if the claimant will agree to pay the occupant for improvements according to the rule prescribed by the legislature. The preamble adverting to the calamities which our citizens were likely to suffer, and to the duty of protection which the government owed them; says: "This commonwealth is called upon, reluctantly to exercise her sovereign power over the lands lying within her territorial jurisdiction, by enacting forfeitures for want of cultivation and improvement; which power she has hitherto forborne to exercise, by substituting other acts of legislation, which seemed to her councils more liberal and less severe. It thus appears, that the legislature has, in the most deliberate manner, asserted the power to forfeit lands for a failure to cultivate and improve them, as the legislature may from time to time direct. And under this power, by the act in question, the legislature has undertaken to transfer the title of the claimant to the occupant, unless the claimant agrees to terms.

The situation of our land titles, and the hardships which the occupant would likely suffer from an eviction without compensation for his improvements, were powerful appeals to the sympathy of the legislature. The fourth condition upon which the district of Kentucky was erected into an independent state, providing that "neglect of cultivation or improvement of any land should not subject nonresidents to forfeiture or other penalty within the term of six years after the admission of said state into the federal union," was calculated to give rise to the inference, that lands might be forfeited for nonimprovement after the said six years had elapsed. Under these circumstances, it is not surprising that the legislature should have been willing to adopt a "severe" remedy, for evils of alarming magnitude to those of our citizens subject to the sinister operation of

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the decision of the supreme court against our occupant laws. I am not insensible to the laudable motives which may have influenced the members of the legislature in the passage of the act of 1824, now under consideration; but believing, as I do, that the power to forfeit lands for nonimprovement, asserted by that act, is incompatible with the constitutions of the United States, and of this state, I shall proceed to assign the reasons for my opinion.

I think no inference drawn from the fourth condition of the compact, can sustain the act in question, when applied for the purpose of forfeiting lands unconditionally granted to individuals in fee simple. Lands thus granted become the absolute property of the grantee, in virtue of a contract made with the government, of which the patent is the evidence. I know of no principle which will allow the government, any more than an individual, after fairly selling and conveying land, to take back the land and resume the title, at its own pleasure, against the assent of the grantee. Neither am I acquainted with any principle which will allow the government to annex new conditions, unknown at the time of the original contract; and for a violation of them seize the land, divest the citizen of his title, and retain the consideration which the citizen paid or rendered, without remunerating him therefor. Those constitutional provisions, which were intended to secure the inviolability of contracts, apply as well to contracts made between the government of a state and its citizens, as to contracts between individuals. In the nature of things, there is as much reason for providing that a state shall not impair the obligation of its own contracts, as to provide that it should not impair the obligation of contracts between individuals. Indeed, there is greater necessity for putting a state under restrictions in regard to her own contracts, than in relation to the contracts of individuals; for as it respects the contracts of individuals, a state may be considered as impartial; but concerning its own contracts, it may be affected by a principle of selfishness. It is enough, however, that the constitution of the U. States and of this state makes no distinction between con-

tracts to which the state is a party, and those to which she is not. If, therefore, the grant or patent to Harvie, should be considered in the light of a contract, by which Virginia transferred her title to him, Virginia, and consequently Kentucky, claiming under Virginia, can no more resume the title, without the assent of Harvie, or those claiming under him, than Harvie could take it from Barrett and Duvall, to whom he conveyed, or from those claiming under them, without their assent.

If there were any lands in the district of Kentucky, which had been granted upon condition that the grants should be forfeited, unless the lands, or town lots, were cultivated or improved within a given period, there may have been good reason for inserting the fourth condition of the compact. Conceding there were such lands, or town lots, the fourth condition of the compact might have a beneficial operation to save them from forfeiture, and may have been inserted with that view; or this abundant caution, thinking it more prudent to guard against forfeitures, for six years, by stipulation, than to rely on the then recently adopted provisions of the constitution of the United States. I am inclined to believe, that there were lands, or town lots, at the date of the compact, titles to which depended upon, *cultivation and improvement*. If so, the fourth condition of the compact had reference to these exclusively; and all ground of inference favorable to the power of forfeiting lands differently situated, is taken away, so far as it depends upon the said fourth condition. I have observed that the proclamation of 1763 speaks of "conditions of cultivation and improvement." I have not deemed it important to make a thorough examination in order to find a class of lands on which the fourth condition of the compact would operate exclusively, for if there were no such lands it would not alter my opinion.

The patent to Harvie, made the subject of forfeiture in this case, was founded on land office treasury warrants, and these were granted in consideration of money paid into the public treasury. The patent upon its face is unconditional, and purports to grant or convey the land in consideration of land warrants. I think the act

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in question violates that clause in the constitution of the United States which prohibits every state in the union from passing laws impairing the obligation of contracts, and likewise that clause in our state constitution which declares, that no law impairing contracts shall be made. That the steps taken by Harvie to obtain the patent, and the issuing thereof to him, amounted to a contract between him and the state, can admit of no doubt. The point is settled alike by reason and authority. *Fletcher vs. Peck*, 6 Cranch, 87; 2 Cond. Rep. 306; *New Jersey vs. Wilson*, 7 Cranch, 164; 2 Cond. Rep. 457; *Town of Patlet vs. Clarke &c.* 9 Cranch, 292; 3 Cond. Rep. 422; *Dartmouth College vs. Woodward*, 4 Wheaton, 518. These decisions of the supreme court fully establish the position, that the modes adopted by the state governments, whether ordinary letters patent, or acts of assembly, for granting titles to the unappropriated public domain, are contracts within the meaning of the constitution of the United States. The contract in the present case, as intended by the parties, was this, that Harvie and his heirs or assigns should enjoy the land granted, forever, in consideration of so much paid to the state for land warrants. The mode and manner of enjoyment was not prescribed; they were therefore left to the volition of the grantee. His dominion was not limited at the time of his purchase. The use to which he should apply the property, to administer to his happiness, was not then designated. In these matters he was left, by the contract, free. He had, as a free man, all those rights and privileges which constitute the birthright of an American citizen. The effect of the act in question is to change the tenure and the contract. That which was before unconditional, is now made to depend upon a condition, to wit, the clearing, tending and belting land, by a given day; that which before was to be subject the dominion of the grantee, his heirs and assigns forever, in consideration of so many land warrants purchased and paid for, shall not now be subject to them forever, unless they will increase the consideration on their part, and do a certain quantity of labor in a specified time; that which before was to be held forever, subject to the

absolute use of the proprietor, according to his unrestrained pleasure, is now to be taken away and given to another, unless he uses it in a particular manner, to which he may be entirely averse. In a word, that which was a source of happiness and enjoyment, under the contract as originally made, is now, under the new conditions and restrictions which have been, or may be made, a source of uneasiness and trouble, if not of unqualified misery. It is my opinion that the constitutional provisions referred to, were intended to prohibit the states from producing such results by meddling with contracts. If an individual, after selling land, was to claim the right of resuming the title, unless his vendee would submit to new conditions, one universal exclamation would denounce his claim as presumptuous, arbitrary and groundless. In matters of contract, I cannot find two rules, one for states, the other for individuals. They must both share the same fate.

Some suppose, that the legislature has power to make the failure to improve, as required by the act of 1824, a *crime or penal offence*, and to enforce the forfeiture as a *punishment*. Were such position correct, then I should be of opinion, that a direct, judicial investigation and conviction of the offender would be necessary, before the forfeiture could be enforced. In such case, the commonwealth should be a party. The constitution, *fourth section of the fourth article*, prescribes imperatively, that "all prosecutions shall be carried on in the name and by the authority of the commonwealth of Kentucky, and conclude against the peace and dignity of the same." So long as this clause of the constitution is regarded and enforced, it seems to me, that a grievous penalty cannot be collaterally imposed upon a citizen, on the trial of a civil action. If it can be done, then a citizen is punished without being prosecuted in the manner required by the constitution.

I am unwilling, however, to concede, that the legislature can, under the pretext of promoting the interest of the state, control and direct the citizen in the use he shall make of his private property. I subscribe to the maxim *sic utere tuo, ut alienum non lædas*; and I admit

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the power to punish for an injury done to individuals or the public. But I deny, that the legislature can constitutionally prescribe, under color of preventing public or private mischief, the quantity of labor the citizen shall perform on his farm, the kind of improvements he shall make, and the time within which they must be constructed. The toleration of such power on the part of the government, would be conceding to it the right of controlling every man, and directing what road he shall travel in the "*pursuit of happiness.*" Thus the freedom of the citizen would be lost in the despotic will of the government, and, under the semblance of liberty, we should have the essence of tyranny.

The act of 1824, now in question, does not treat the failure to improve as therein required, as a criminal or penal offence. The forfeiture is not placed upon the ground of *punishment* for a criminal act of commission or omission; but the whole tenor of the statute shews, that the legislature conceived they had constitutional power to require the citizen to improve his land, as a condition upon which it should be held. It is an attempt to change the tenure of the property—to make the holding depend upon the improvement as a new condition annexed to the estate, instead of letting it rest upon the original contract. The grantor undertakes to direct the manner of using the property, as a condition upon which the grant shall remain effectual. If this new condition is allowed, the contract, as made, cannot stand. No man purchases land either from the state or an individual in fee simple, without taking and holding it untrammelled in the manner of using it. The very object, in making the purchase, is to obtain the exclusive control, and to get clear of any control over it by the vendor. The attempt, thereafter, by the vendor, to resume the control, is in violation of the manifest purpose and design of the contract, and strikes at its essence.

Those constitutional provisions which were intended to shield the property and contracts of the citizen, were considered in the case of *Davis vs. Ballard*, 1 J. J. Mar. 566, by this court. It was there determined, that the legislature had no power to take the property of one cit

izen and transfer it to another, or to apply it to public use, *without the consent of his representatives, and without just compensation being previously made to him.* It is unnecessary to repeat here the arguments made use of in the opinion delivered in that case. The conclusion from them is still approved. The act of 1824 provides for taking away the land, but makes no provision for paying the owner a *just compensation.* The principles settled in *Davis vs. Ballard* denounce the act as unconstitutional.

If the power to forfeit lands for nonimprovement exists, it would only require an act prescribing irksome or impossible conditions, to strip the citizen of all his property. In regard to the power, there is no difference between real and personal estate. In the nature of things, there is as much propriety, it seems to me, in forfeiting a horse to the government, because his proprietor does not curry and rub him well, or break him to labor gently in the gear, as there is in forfeiting land because the owner does not choose to clear and cultivate a part, and deaden the trees growing on another part. Such interferences on the part of the government with the private affairs of individuals would ever be a source of discontent, if they were expressly tolerated by the constitution. Their obvious impolicy is a strong reason in favor of the conclusion to which I have arrived. The members of the convention, anxious to place the enjoyment of life, liberty, and property, upon secure foundations, cannot well be imagined to have left all property subject to the absolute and arbitrary control and disposition of the legislature.

I intend no disrespect to the legislature, in supposing that impossible conditions might be prescribed, in times of excitement, for the purpose of forfeiting estates. That has been done in the act in question. The rights of infants, *femes covert*, and persons of unsound mind are saved, and two years are allowed after their disabilities are removed, to make the required improvements. But there is no saving in behalf of the weak and decrepit, who cannot labor, and who have no means of hiring others to work for them. It is morally impossible for persons thus situated, who have no property but the

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land adversely possessed by others, to escape the forfeiture. The first three sections of the act relating to champerty &c. would prevent the proprietor from selling any part of his claim, to enable him to pay laborers for improving the balance.

But again, the claimant out of possession has no legal right to enter forcibly upon the land held adversely by the occupant; and if he should so enter, he may be put out by the summary remedy given for a forcible entry. How can he improve as the act requires, when the general laws of the land will not allow him to enter with force &c. to retain possession long enough to do the work if he does enter? To obtain a judgment or decree in favor of the better claimant, out of possession, by suit, and thus to get possession by writ of *habere facias*, in time to do the work required, by the 1st of August, 1825, in many cases, was impossible. There may, therefore, be many claimants who, with every disposition to comply with the requirements of the act, to save their lands from forfeiture, could not possibly do it. The operation of the act, if enforced, upon such persons, would be more severe, in relation to their property, than an attainder for treason or felony could be made, under any judicial proceedings which the legislature might authorize. The twentieth section of the tenth article of the constitution declares, "that no attainder shall work corruption of blood; nor, except during the life of the offender, forfeiture of estate to the commonwealth." Thus, by comparing the act of 1824 with the constitution, I find that while the legislature are expressly prohibited from passing laws to forfeit the estates of attainted traitors and felons, except during *life*, they have undertaken to forfeit *forever* the estates of those who have been guilty of no crime, unless it be a crime to have the better title to a tract of land held adversely by another! This contrast fortifies my conviction that the legislature do not possess the power to pass a bill of forfeiture like this. When the estate of a tainted felon can only be forfeited *during life*, is it not, within the contemplation of the supreme law, an *excessive fine* or a *cruel punishment* to forfeit *forever* the estate of a



man, merely because he is unwilling and fails to improve it, even if he could? The constitution says, "that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."

Thus far I have considered the operation of the act of 1824 in relation to conflicting claims; but there is still another view which I think will place its unconstitutionality in a more palpable light. The eighth section forfeits every tract of land in the state of more than one hundred acres, unless it be improved as required, by the time specified. The last clause in the act provides, that "a citizen proprietor actually residing on, or in possession of, one of his surveys, shall not be compelled to cultivate or improve a second or other survey or tract, on which there is no conflicting claim or adverse title." Thus the wealthy who resides on one tract, owning many, saves all. But the man or woman who owns only one tract, and is too poor to improve that, and is compelled to rent, or live in, the house of another, loses, by the forfeiture, all they have, notwithstanding it may not be interfered with. If, however, the person owning land, and not residing upon his own, is not so poor, but has more than one tract, then he is required to improve each of his tracts, even if they amount to a hundred in number, although there may be no interference with any of them. Thus it is, that onerous burdens are put upon one citizen, whilst another is exempted, upon no other ground of distinction between them, than that one lives on his own land, and the other does not. I find no warrant in the constitution for such partiality between citizens. I will not consume time by enquiring, whether the act, so far as it attempts to make a distinction and a difference between citizen proprietors residing on their own lands, and nonresidents, citizens of other states, residing on their own lands, is not in violation of the first clause of the second section of the fourth article of the constitution of the United States, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

I have heard it contended, that the acts passed with a view to secure compensation for improvements to occu-

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pants, cannot be sustained on constitutional grounds, if the power to forfeit for nonimprovement is denied. I have heard it contended, that the act of 1824 was constitutional, because, when the effect of the tenth section is considered, it is no more than an auxiliary to enforce the acts to secure compensation for improvements. These two ideas I will briefly examine.

The acts to secure compensation to the evicted occupant for his improvements, are nothing more than a remedy to enforce the performance of a duty enjoined by every principle of natural justice. The *bona fide* occupant who converts the wilderness into a farm, renders the land more valuable by the addition of his improvements. The question in such a case, is, shall the successful claimant profit by the labor and expenditures of the occupant, by getting them for nothing, or shall he make compensation? Justice answers, that no one, without paying a consideration, or contracting to do so, shall be enriched by the loss of another. Hence the successful claimant is bound in conscience to make compensation for improvements which cost him nothing, but which may have cost the occupant much toil and money. Our occupant laws reduce this moral duty to a legal obligation. Independent of our statutes, the chancellor, acting upon the basis of natural equity, would secure to the *bona fide* occupant, the value of his ameliorations. The statutory remedy afforded relief for the same thing, according to a rule prescribed by legislative, instead of judicial power. The occupant pays, in improvements, a consideration for the compensation secured. All this may be done, I think, without rendering "invalid and insecure" the "right and interest" of the successful claimant in and to the land. And, therefore, I think our occupant laws do not conflict with the third condition of the compact with Virginia. But these arguments which address themselves with force to my mind, are destitute of weight when applied in support of an act of forfeiture. What consideration, or benefit, does the owner of the estate receive for the loss of it, by forfeiture for nonimprovement? None. How is he enriched by the labor of another? Not at all. What moral duty is he under to surrender

an estate fairly purchased and paid for? None whatever. I cannot, therefore, perceive the shadow of analogy between a law which secures compensation for improvements made in good faith, and a law which forfeits the estate, without a crime, and transfers it to another, who is not required to pay the owner one cent. The principles and operation of a law to forfeit land, and a law to secure to occupants the value of improvements, are altogether dissimilar; and, therefore, I cannot perceive how they are so connected that they must stand or fall together.

I admit that the tenth section of the act allows the claimant to escape the forfeiture by agreeing to comply with certain laws therein enumerated; which laws have always been enforced by this court. As an auxiliary to enforce the occupant laws, there was no necessity for the passage of the act of 1824, as it related to the state courts. The act was intended to operate, as its preamble shews, upon litigants in the federal courts. How far a state can, by its legislation, change the course of decision in the federal courts, when no change is effected in its own tribunals, is a question not necessary to be disposed of here. At present, I am only concerned to shew, that there is no soundness in the idea which supposes, that the act in question is constitutional in consequence of the aid afforded the occupant laws previously enacted. As already stated, no aid was given to those laws before the courts of Kentucky, by the act of 1824, and none could be given by it, because those laws were enforced in all the tribunals of Kentucky before the act of 1824 was passed. It must be the effect which the act of 1824 will have in the federal courts, in counteracting the principles settled in the case of *Green &c. vs. Biddle*, which must identify it with the occupant acts, and give to it the same degree of constitutionality which they possess. Whether it will have any effect in the federal courts, belongs to them to determine. But let it operate as it may in these courts, I think it can be clearly shewn, that its operation there cannot reconcile it with the constitution. The decision of the supreme court in *Green vs. Biddle*, is either right or wrong. If right,

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then the act of 1824 was conceived for the purpose of thwarting what is right; but if wrong, then the act was designed to overturn error, or to guard against its consequences.

I will consider the question, first, upon the supposition, that the decision of the supreme court is right. That being granted, how does it stand? Thus. It is right that the claimant should recover his land without paying for improvements, as required by the occupant laws. But the legislature having the power, if the act of 1824 is constitutional in its forfeiting features, says to the claimant, "you shall not recover, your land shall be forfeited, unless you consent to pay your adversary for certain improvements he has made upon it." I think the claimant might reply, "the principles of your constitution forbid you to hold such language to me. You propose that I shall pay for justice. I do not ask it at the hands of your courts, but if you have the right to prescribe a rule for the courts where I apply for redress, I deny that you can, without violating a salutary provision of the constitution under which you act, force upon me the terms you propose. Your constitution says, 'right and justice shall be administered, without sale, denial or delay.' I will not purchase justice by paying for improvements which the highest judicial tribunal known to our common country, has decided I am not bound to pay for." It seems to me, that it is nothing less than a *sale of justice*, to require the man who seeks it, to pay, or to agree to pay, a sum to his adversary, which it is admitted, under the view I am now taking, he is not bound by law to pay. In this light, the act of 1824, makes the administration of justice depend upon a bargain, and sells justice, not for a bribe paid to its makers, but for a consideration to be paid to the occupant. Justice is sold, in my opinion, within the meaning of the constitution, whenever any thing valuable is required of either of the parties litigant to be paid, or secured to be paid, at a future day, as a condition upon which their complaints shall be heard, and their controversies decided upon their merits. I would not embrace, by the rule, tax on law process, or any thing else paid or secured,

when provision is made for its restoration, or an equivalent, in the event of a successful termination of the suit. But where a party is required to pay in order to get justice, and the sum paid is to be lost forever, without a possibility of indemnity, it amounts, as I conceive, to an inhibited sale of justice. The tenth section requires, that he who "*desires to litigate his claim*" shall file his engagement, under hand and seal, to the occupant, stipulating to comply with the act of 31st January, 1812, &c. "before suit commenced, or before judgment rendered where suit has already been commenced," to wit, at the date of the act of 1824. If the decision of the supreme court be right, the act of 1824 is a palpable attempt to coerce the better claimant to purchase justice, and it prescribes the price at which the federal courts are to sell it. I have heard it said, that the clause of the constitution which prohibits the sale of justice, was merely intended to operate upon the judiciary, and to restrain corrupt practices with judges. I give it no such limited construction, but extend it to all the departments of government, and would enforce it, as one of those great fundamental principles essential to the welfare of society.

I proceed, in the second place, to consider the question upon the belief that the supreme court is wrong. That admission may induce us to think favorably of the motives of the legislature; but it cannot remove my objections. Suppose this court was to give an erroneous decision greatly beneficial to one class of the community, and equally prejudicial to another, and the legislature should undertake to counteract the error, by putting those whom it benefitted upon terms. Imagine, for example, that the legislature had been dissatisfied with the decision, which holds the assignor responsible to the assignee, upon his failure, on due diligence, to collect from the obligor; suppose the legislature had undertaken to obviate the effects of the decision and error of the court, by enacting, that no assignee should bring suit upon the bond, or obtain judgment against the obligor, until he had filed a release to the assignor, acquitting him of all responsibility—could the legislature defeat

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the effect of the decision by such an act? I think not. Such a law would be selling justice to the assignee, if he complied with the act, or denying it altogether, if he refused. The price paid for a judgment against the obligor, would be the value of the release to the assignor. In the case stated, the legislature might change the rule, so that future assignments would impose no obligation upon the assignor; but such change could not operate upon vested rights under previous contracts. These would necessarily be disposed of according to the erroneous decision, unless the court abandoned it. The misfortune in the case of our occupant laws, is, that the legislature of Kentucky has no power, without the consent of Virginia, to alter the rule as to cases which may hereafter occur. Her hands are tied by the construction put upon the compact by the supreme court. Virginia has refused to give her consent. Under these circumstances, *revolution*, or acquiescence in the decision of the supreme court, are the alternatives presented to Kentucky. And whether the decision be right or wrong, cannot change or effect the character of the act of 1824.

But again, are not all acts of the legislature, passed with the intention to frustrate or countervail a judicial decision, and not to change the law as it may operate on new cases, encroachments upon the judiciary, and usurpations of power? "No person or collection of persons, being of one of the departments of government, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted," is the language of the constitution. The legislature has no power to revise, annul, or counteract a decision of this court, much less one of the supreme court. If the law, as expounded by the judiciary, is not consistent with the public will, it is the province of the legislature to alter it in regard to new cases; but the legislature has no power to say, this or that judicial sentence is erroneous, and therefore we will alter it. I do not mean that the opinions of the judiciary are too sacred for legislative investigation. On the contrary, I hold that the legislature may investigate the opinions of judges with a view to render them re-

sponsible for corruption, by impeachment, or for ignorance, by address and removal. Indeed, I think every citizen has a right to arraign at the bar of public reason, every judicial opinion. What I mean is this, that according to the organization of our government, the legislative department transcends its power whenever it undertakes to thwart or counteract the judgment or decree of a court of competent jurisdiction. It cannot do this *directly*, without trampling upon the constitutional functions of the judiciary. It cannot do *indirectly* that which could not be done by direct action. A careful examination of the act of 1824, has satisfied my mind, that all its provisions for forfeiting lands were intended to thwart and counteract the decision of the supreme court, and are so far, an unconstitutional interference with the legitimate operations of another department.

I have endeavored to shew, that the legislature cannot constitutionally forfeit land, because the owner will not clear it, or build houses of brick or stone, or ornament it with gardens, &c. &c. &c. If I am right in that position, I cannot perceive how it is possible to make the forfeiture constitutional by regarding it as the means to accomplish a desirable end. I do not subscribe to the doctrine, that the end will justify the means, either in law or morals. The congress of the United States have power "to make all laws which shall be necessary and proper for carrying into execution any power expressly granted." The congress are expressly prohibited from laying a tax, or duty, on articles exported from a state. Now, it would be strange legislation, and palpably unconstitutional, I think, for congress to tax articles exported from a state, assuming as a justification for so doing, that it was *necessary and proper* to raise a revenue. One clause of the constitution cannot thus be made to overrule another. Effect must be given to the whole. So if it be unconstitutional to forfeit lands for nonimprovement, and be constitutional to pass laws securing compensation to occupants for their improvements, the unconstitutionality of the forfeiture cannot be got over, upon the pretext that the forfeiting act is necessary and proper to sustain constitutional laws against erroneous

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judicial opinions. The prohibitions and limitations of power contained in all our constitutions are but mockeries, if they can be evaded by such shallow reasoning. The legislature could not constitutionally enact, that the life of one citizen should be offered up as a sacrifice, if thereby the quarrels of nations could be reconciled, and the calamities of war brought to an end. The *end* will not consecrate the *means*.

I shall notice one idea more in defence of the act, and only one. It is the appeal made in the preamble to the *sovereign power of the state*. I do not admit that there is any *sovereign power*, in the literal meaning of the terms, to be found any where in our systems of government. The people possess, as it regards their governments, a *revolutionary sovereign power*: but so long as the governments remain which they have instituted, to establish justice and "to secure the enjoyment of the right of life, liberty and property, and of pursuing happiness;" *sovereign power*, or, which I take to be the same thing, *power without limitation*, is no where to be found in any branch or department of the government, either state or national; nor indeed in all of them put together. The constitution of the United States expressly forbids the passage of a bill of attainder, or *ex post facto law*, or the granting of any title of nobility, by the general or state governments. The same instrument likewise limits the powers of the general government to those expressly granted, and places many other restrictions upon the power of the state governments.—The constitutions of the different states likewise contain many prohibitions and limitations of power. The tenth article of our state constitution, consisting of twenty eight sections, is made up of restrictions and prohibitions upon legislative and judicial power, and concludes with the emphatic declaration, "that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void." These numerous limitations and restrictions prove, that the idea of *sovereignty in government*, was not tolerated by the wise found-



ders of our systems. "Sovereign state" are cabalistic words, not understood by the disciple of liberty, who has been instructed in our constitutional schools. It is an appropriate phrase when applied to an absolute despotism. I firmly believe, that the idea of sovereign power in the government of a republic, is incompatible with the existence and permanent foundation of civil liberty, and the rights of property. The history of man, in all ages, has shewn the necessity of the strongest checks upon power, whether it be exercised by one man, a few, or many. Our revolution broke up the foundations of sovereignty in government; and our written constitutions have carefully guarded against the baneful influence of such an idea henceforth and forever. I cannot, therefore, recognise the appeal to the sovereignty of the state, as a justification of the act in question. Hence I conclude, that the circuit court erred in refusing to give the third instruction asked for by the plaintiff, and in giving the first asked for by the defendant.

The third instruction given on the application of the defendant, was correct. Harvie conveyed the entire tract patented to him to Barrett and William Duvall, as tenants in common, and not as joint tenants. Barrett conveyed his moiety to Gaines. The declaration contains a joint demise in the names of Barrett and Duvall. It contains no separate demise in the name of Duvall. As the title was traced from the patentee down to Duvall and Gaines, if Duvall could not recover, the instruction was correct. That he could not recover upon a joint demise, being but a tenant in common, is too well settled by authority to be disturbed or discussed. See *Innis &c. vs. Crawford*, 4 *Bibb*, 241; *Miller &c. vs. Hoy &c.* *Ib.* 568.

As there could be no recovery except on the demise in the name of Gaines, the enquiry whether Duvall's interest had been forfeited for a failure to pay taxes, or to list it for taxation, was entirely irrelevant, and only served to incumber the case, I therefore deem it useless to notice the instructions on either side upon that subject.

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A tenant in common cannot recover upon a joint demise. Instruction 3, p. 483.

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A cause may be reversed for erroneous instructions, notwithstanding the verdict may appear to be right upon the proof.

It has been insisted, that if the circuit court erred in deciding one or more points of law, still there should be no reversal, because it is clear, that Buford was protected by the settlement and residence of his tenants on the land for seven years before suit was instituted. Buford's protection by the statute of limitations depended upon the testimony. The jury were the proper judges of the facts. I cannot tell what influence the erroneous instructions of the court, relative to the act of 1824, may have had upon the minds of the jury. Therefore, I am for reversing the judgment and giving a new trial, upon which the forfeiture contemplated by the act of 1824 shall not prejudice the plaintiff.

I have detected no error in the instructions given in relation to the settlement and residence of Buford's tenants.

It is therefore considered by this court, that the judgment of the circuit court be reversed, with costs, and the cause remanded for a new trial, upon which the act of 1824, so far as it purports to forfeit the title of Gaines, for nonimprovement, must be disregarded, and in other respects, the trial conducted in conformity to this opinion.

*Judge Nicholas' Opinion.*

JUDGE NICHOLAS :—The only question presented in this case, upon which I care to make any comment, is, whether the title of Gaines to the land in contest, was forfeited to, and vested in, the commonwealth, by reason of his noncompliance with the requisitions of the eighth section of the act of January, 1824, a noncompliance with which by the 1st of August, 1825, is therein declared to forfeit all title to land in this state, and immediately vest the same in the commonwealth, without judgment, or office found.

The whole question turns upon the power of the legislature so to forfeit his title; for, if the power exists, there is no doubt it has been exercised.

The power cannot be claimed on the ground of an original condition, attached to the grant of the land from Virginia, that it should be improved within any prescribed time. There was no such condition expressed

or implied ; nor is there any reasonable pretext for contending that there was. Neither can it with propriety be said, that any act of the governments of Virginia or Kentucky has added, since the issuing of the patent, or could have added any such condition to it. The patentee having held the title free from any such condition at the time of the adoption of the federal constitution, no act of either government, or of both of them combined, could, thereafter, superadd that, or any other new term, to the contract growing out of the patent, without the assent of the patentee. The federal constitution, at its adoption, clothed the contract with an inviolable sanctity that could not be infringed by any legislation of either of the states, or by any compact thereafter entered into between them. For nothing can be better settled by authority than that an executed contract, such as a grant, comes as fully within the constitutional protection, as any executory contract, and that it makes no difference that a state is one of the parties to the contract.

If the act in question be, as it is assumed in argument to be, a mere naked resumption of the land by the state, or a simple declaration that the title should be taken from the claimants and vested in the state, there can be no dispute that it falls directly within the inhibition against laws impairing the obligation of contracts. It would be a violation of the contract of the plainest and most palpable character. Or if, as is contended, the patent gave the patentee such perfect and absolute dominion over the land, as took from the commonwealth all power of thereafter controlling him as to its use, or nonuser, or the mode of its use, then it must also be conceded, that the act impairs the obligation of the contract, by attaching terms and conditions to the enjoyment of the property, from which the patentee was exempt by the stipulations of the original grant. But I do not feel prepared to treat the act as any such mere arbitrary resumption of the title, or to concede that the patent carried with it any such absolute surrender of the commonwealth's ulterior right of dominion over the land. The act enjoins upon the proprietors of all land claims within the state, by a named day, to make mani-

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fest and knit their claims to the soil, by making the improvement therein prescribed; and on failure therein, forfeits all such claims to the commonwealth. I am not prepared to say that it was a part of the terms of the contract, either express or implied, that the legislature should never pass such a law, or that the land granted should perpetually remain exempt from forfeiture, for the violation by its proprietor of any of the penal enactments of the state, or that there was any implied condition appended to the contract, that will prevent the government in all time to come, from controlling the proprietor of the land in its use or nonuser, or in the mode of its use. That doctrine would carry us a great way. How far it would carry us, it is impossible at once to foresee. The mind cannot, at a single effort, cast itself over the whole circumference of its extension. It is not sufficiently clear to my mind, that it will not go far enough to cripple and curtail powers, that are essential and indispensable to all governments. The doctrine should be approached and handled with great caution and circumspection. According to my view of the subject, the question to be decided, can be disposed of without determining that point; and I shall, therefore, forbear to express any positive opinion upon it.

Conceding that the act in question does not impair the obligation of the contract, there is still left an important and most difficult question: that is, whether, under the constitution of Kentucky, the legislature has the power of denouncing forfeiture as the penalty for not improving land. It is a question about which different opinions may well be entertained. There are clauses of the constitution, taking the compact with Virginia as a part of it, which have a strong bearing both ways. The case, however, does not necessarily require a decision of that question either. My opinion of the effect of the act upon Gaines' title is made up on other and different grounds.

To escape the objection that the act is a violation of the contract growing out of the patent from Virginia, it is indispensable that the act should be treated as enjoining a duty on land proprietors, and then, for the failure to

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perform that duty, prescribing the penalty of forfeiture, as a mode of enforcing obedience to the legislative command. It is, therefore, a highly penal law; and if the power of the legislature to prescribe such a penalty for such an offence be conceded, it is still very material to enquire, whether the manner in which it is attempted to be enforced, is allowed by the federal and state constitutions. This court has been compelled, on several occasions, to deny the validity of legislative enactments, because of their being attempts to exercise admitted powers in an unconstitutional manner.

If the title of Gaines has passed to the state, it did so on the 2nd of August, 1825, by the mere force and effect of the words of the act of 1824. The question is, could the act so pass the title?

By an article of the Kentucky constitution, which is the foundation of the whole superstructure, the powers of government are divided into three distinct departments, and confided to separate bodies of magistracy: those which are legislative to one, those which are executive to another, and those which are judiciary to a third, with a declaration that no person or persons being of one of those departments shall exercise any power properly belonging to either of the others. It is of the last importance to the purity of our institutions, that this division of powers should be preserved, and this barrier against the encroachment of one department upon another should be properly kept up. Will it not be broken down, if the act of 1824 is permitted to divest Gaines of his property, and give it to the state without any judicial proceeding against him—without any judicial condemnation for the alleged offence, and without even an office found?

At common law, where lands were forfeited for any offence by the owner against the laws of society, no title vested in the sovereign until conviction; and even after conviction, his title was considered as inchoate only, until office found. Such also was the rule, as acted on by English courts, where the forfeiture was prescribed by an act of parliament. It is true that parliament might, in its omnipotence, dispense with a conviction and of-

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five along ther, but this was seldom, if ever done. Such an act would constitute only an extraordinary exception to the general rule. The uniform practice in the ordinary case, for centuries, points out and discriminates with sufficient distinctness the boundary line between legislation and adjudication on this subject, as it must have been understood by the framers of the constitution.

To enjoin what shall be done, and what left undone, and to secure obedience to the injunction by prescribing appropriate penalties, belongs exclusively to legislation. To ascertain a violation of such injunction, and inflict the penalty, belongs to the judicial functions. To command the improvement to be made, and declare forfeiture of title as the penalty for failing to make it, in the manner they are done by the act of 1824, is pure legislation. To ascertain that Gaines had not made the required improvement, and thereupon condemn his title as forfeited to the state, belong not properly to legislation, but to adjudication.

The sixth section of the tenth article of the constitution says, the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate. To what class of cases does this apply, and where is this right to remain inviolate, if it be not where the citizen is pursued for an infraction of the penal laws? What law is so penal excepting those affecting life and liberty, as this which forfeits a man's real estate—which takes from Gaines, for a single omission of duty, twelve thousand acres of land?

The tenth section of the same article provides, that, in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; and, in prosecutions by indictment or information, a speedy public trial, by an impartial jury of the vicinage; and that he shall not be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. Does not this clause require, that for every offence which incurs so heavy a penalty as the forfeiture of a man's estate, he should be publicly prosecuted, and not liable to con-

demnation, unless by the judgment of his peers, in a due and regular course of legal, judicial proceeding.

The clause is almost a literal transcript from an article of *magna charta*, which has uniformly received that construction. Lord Coke, 2 *Inst.* 50, gives, as the settled construction and true meaning of the words "*or by the law of the land*," in *magna charta*, "without due process of law, so that no man be taken, imprisoned, or put out of his freehold, without due process of law; that is, by indictment or presentment of good and lawful men, &c. &c." "Against this ancient and fundamental law," says he, "I find an act of parliament made, that justices, (without any finding, or presentment of twelve men,) upon a bare information, should have power to hear and determine all offences committed against any statute. By color of which act, shaking this fundamental law, it is not credible what horrible oppressions and exactions, to the undoing of infinite numbers of people, were committed by Richard Empson and Edmund Dudley, being justices of the peace throughout England." Such also, is the signification given to the words, *the law of the land*, by the most eminent American jurists. See 2 *Kent's Com.* 10; 3 *Story's Commentaries on the Constitution*, 661, and 1 *Tuck. Blk.* 304.

In the case of *Ely vs. Thompson*, 3 *Mur.* 74, it is intimated, that this clause of the constitution contemplates more kinds of public or criminal prosecutions than those which are carried on by indictment or information. But, as is there said, it evidently secures the right of being heard, of obtaining the nature and cause of the accusation, and of confronting the witnesses, in any mode of prosecution, for any offence or crime against society. In *Enderman vs. Ashby*, *Pr. Dec.* 65, it was decided, that the act of 1792, prohibiting traffic with slaves, and authorizing the owner to recover four times the value of the thing bought or sold, was unconstitutional, because it did not secure the accused in his right of trial by jury. In *Carson vs. Commonwealth*, 1 *Mar.* 290, it was held, that the county courts could not inflict the fine and treble tax, authorized by the act of 1810, for giving in a false list of taxable property, because the constitution secured

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to the party his trial by jury, he having had a right to it, as the law stood at the adoption of the constitution. And in *Olds vs. Commonwealth*, 3 Mar. 467, it was held that a person prosecuted for failing to give in a list of taxable property, was under the protection of this clause of the constitution, and entitled to be heard by himself and counsel.

It would seem, therefore, not merely from the apparent import and spirit of the constitution, but from the settled construction given to its language by these concurring authorities, that Gaines was entitled to a hearing, and some mode of trial by a jury, before his property could be taken from him for this alleged violation of law, in failing to make the required improvement.

The forfeiting act passed in January, 1824, and the improvement was required to be made on or before the 1st of August, 1825. At both periods, the land in contest was in the adversary possession of Buford. It is believed, that no degree of diligence would have enabled Gaines to have got into possession under a judgment in ejectment, and made the required improvement within those periods, provided the case had been appealed to this court. If this be the fact, then the act is obnoxious to censure, as repugnant to the spirit of that clause of the constitution which prohibits the passage of *ex post facto* laws. Prior to this act, there was no law requiring the improvement to be made or prescribing a penalty for not improving. If, then, sufficient time was not allowed Gaines to turn the occupants out of possession by due course of law, and make the required improvement, it was the same to him, in effect, as if the act had allowed only a day, or no time at all, for making it. An act of the latter description, though it might not fall literally within the definition of an *ex post facto* law, yet it would come fully and completely within the reason and policy of the inhibition against the passage of such laws.

The prohibition of the federal constitution against the passage of bills of attainder, is also deemed to have an important bearing on this question.



*Bills of attainder* are said by Woodeson, in his lectures, to be acts of the supreme power, pronouncing capital sentences, where the legislature assumes judicial magistracy; and *bills of pains and penalties* those which, inflict milder punishments. But it is believed that, *bill of attainder* is a generic term, comprehending both description of acts. Such, at least, is believed to be its true signification, as used in our constitutions. Thus it is said by the supreme court, in *Fletcher vs. Peck*, 6 Cranch, 138, "a bill of attainder may affect the life of an individual, or may confiscate his property, or both." So also, it is said by Judge Tucker, in his edition of Blackstone, volume 1, page 292, "bills of attainder are legislative acts, passed for the special purpose of attainting particular individuals of treason, or felony, or inflicting pains and penalties beyond or contrary to the common law." That the term should be received in the large sense thus given to it, is consonant with the true republican character of our institutions. A condemnatory act of the legislature inflicting upon an individual, or class of individuals, pains and penalties, is as much within the reason of the prohibition, as if it inflicted capital punishment. They are both equally hostile to the principles of civil liberty and the spirit of our written constitutions. They are equally engines of tyranny and oppression, and equally unsuited to the government of a free people.

Understanding, then, the term bill of attainder as embracing bills of pains and penalties, the act in question would seem to fall under this inhibition. That it is a highly penal law, inflicting a most grievous penalty for the omission of the thing commanded to be done, is beyond dispute. But it is not the weight of the penalty, nor the character of the offence, that makes it a bill of attainder. But it is the confiscation of the property of individuals, which it attempts to make, before any condemnation, and without any condemnation, for the offence designated, either in *personam*, or in *rem*. When the state rightfully acquires the property of a citizen by forfeiture, it is, as the punishment annexed, by law, to some illegal act, or negligence of its owner. That

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the legislature may make the act or omission illegal, and prescribe forfeiture as the penalty, is admitted. But it is denied, that it can of itself inflict the punishment. So far as the act in question undertakes to divest the title out of Gaines, and vest it in the state, it is a legislative infliction of the penalty, it is an assumption, to that extent, of judicial magistracy, without affording the accused the benefit of those forms and guards of trial, which are his constitutional right, whenever he is sought to be punished, either in his person, or by forfeiture of his property, for alleged violations of the penal enactments of the state.

The legislature may, no doubt, make a forfeiture relate back from the time of conviction, and take effect from the time of the offence committed; but this power by no means necessarily carries with it the right to supercede the necessity of a conviction, in order to make the forfeiture take effect. The right to forfeit is an incident merely to the power to punish guilt. Without the guilt, the forfeiture cannot be incurred. The guilt cannot be ascertained by the legislature, nor otherwise than by a direct criminal procedure of some sort, and a judicial determination thereon.

Bills of attainder have generally designated *their* victims by name; but they may do it also, by classes, or by general description fitting a multitude of persons. Either mode is equally liable to moral and constitutional censure. They have generally been applied to punish offences already committed; but they have been, and may be, applied to the punishment of those thereafter to be committed, or for criminal omissions thereafter incurring. A bill of attainder is not necessarily an *ex post facto* law. A British act of parliament might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated, as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it without indictment or trial by jury; the prisoner when brought to the bar, being merely asked what he

has to allege why execution should not be awarded against him.

It is unnecessary to say whether either of the several clauses of the constitution referred to, would, singly, be sufficient to invalidate the act; and I do not wish, therefore, to be understood as saying that either of them would. But that some, or all of them together, do invalidate it, I feel no doubt. They all tend to shew that the legislature cannot, in this mode, by any mere act of its own, divest a citizen of his property. They constitute together, in letter, spirit and general scope of policy, a mass of obstacle to the divestiture of Gaines' title, in the manner contemplated, which to my mind is perfectly insurmountable, and which compels me to concur in saying the title is still in him, and that the act of 1824 is no obstruction to his recovery.

It is no satisfactory answer to these suggestions, that the question of forfeiture is adjudicated upon by a court of justice, and that Gaines has had a public trial, before a jury, in this action of ejectment. He was there defending no plaint of the commonwealth; there was no accusation against him, at the instance of the commonwealth, of which he was notified, and called upon to defend; nor was the jury sworn to try an issue between them. It was no prosecution, "carried on in the name and by the authority of the commonwealth of Kentucky." The question of forfeiture and divestiture of title came up collaterally only. It was used as part of the defendant's case, to shew that the plaintiff's title had theretofore, before the institution of the suit, passed from him and vested in the commonwealth. The forfeiture was the result of nothing done in that suit. The verdict and judgment formed no condemnation upon which to base it, and from which it could follow as an incident. They were themselves but the result of a forfeiture theretofore incurred, and of a divestiture of title which had theretofore taken place. The court and jury were not a mean for carrying into effect what the legislature had commanded, but acted upon what it was supposed the legislature of itself had already done. The title passed from Gaines on the second of August, 1825,

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long before this trial, or it is still in him. If the act of itself could divest him of his title, it was competent for the legislature to have directed it to be regranted to another person, and that person could, upon the title so acquired, have evicted Gaines, provided he had subsequently obtained the possession, with the same propriety that the statutory forfeiture can now be relied upon to defeat his recovery.

Nor will these suggestions be answered, by the obvious difficulty, if not impracticability, of enforcing the forfeitures by direct criminal proceeding against such a host of unknown and unascertainable delinquents. If the power attempted to be assumed is a wholesome one, and was wisely and equitably exerted in the given instance, it will be matter of regret that other and higher considerations induced the framers of the constitution to withhold from the legislature the power of giving such wholesale and summary redress. If, on the contrary, the existence of such power would be noxious to the common weal, and its exercise in this instance was oppressive, unwise, unequal and unjust, then it will be matter for congratulation, that the wisdom of the constitution has secured the community against such extensive oppression, and that the very extent of the evil intended, is of itself a security against its perpetration. Men will rejoice, or regret, on this subject, according to their different views of the wisdom and justice of this act. But with that we have nothing judicially to do. We must test its validity without regard to the presence or absence of those qualities

By the tenth section of the act of 1824, the plaintiff or claimant is allowed to avoid the whole effect of the forfeiture denounced in the preceding sections, provided he will file an agreement to abide by and conform to the occupant laws; and by a settled course of decision in this court, the occupant laws referred to in the tenth section, are none of them infractions of the constitution, the decision of the supreme court in the case of *Green vs. Biddle* to the contrary notwithstanding. It may, therefore, be asked, *cui bono* declare the law unconstitutional, at the instance of a perverse litigant, who

could have shielded himself from its whole effects, by merely agreeing to do what he would equally have been bound to do whether he made such agreement or not. If the act had simply required such agreement to be filed before suit brought, under the penalty of dismissal, or refusal to afford relief, there would have been much difficulty in making out any satisfactory reasons for refusing it obedience. The objection that what it required was idle and useless, would amount to nothing on the question of its validity. It would require from him the surrender of nothing of value that was his. For it would be a most uncanonical, illegal surmise, that his privilege of carrying the case to the supreme court, and the chance of his obtaining there a decision against the validity of the occupant laws, was of any value. Those laws are, or are not, constitutional. As they now are, the one or the other, so they must remain. The decisions of this court, since that of *Green vs. Biddle*, went upon the hypothesis of its being improvident, ill-advised, and that it must be taken back whenever the point is again presented to the supreme court. Upon any other hypothesis, the whole course of the later decisions of this court upon that subject, are entirely unwarranted and indefensible. It is, therefore, an inadmissible surmise, for any purpose of administrative justice, to suppose the supreme court ever will do otherwise than affirm those laws as constitutional.

But the scope and effect of the act of 1824, is not confined to a refusal of relief, in any suit to be brought, unless the claimant will make the agreement to abide by the occupant laws. It does not aim to effect its ends by any such process. It denounces a forfeiture and confiscation of title, for failing to improve, and if allowed to take effect in that way, it will forever bar and preclude the plaintiff from any future action, though he might be willing to make the agreement as required. As it cannot take effect in that way, it must be held inoperative, both upon his title and his suit.

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CHANCERY. **Johnson and Others against Fuquay and Others.**

[Mr. Firtle for Plaintiffs ; Mr. Crittenden for Defendants.]

FROM THE CIRCUIT COURT FOR OHIO COUNTY.

November 4.

Judge NICHOLAS delivered the Opinion of the Court.

If an administrator makes distribution, and debts appear, he is liable for a *devastavit*: he must look to the distributees for indemnity, and if he took no bond of them, must abide the consequences.

One who is both adm'r and guardian, will be deemed to hold the assets in the former capacity, where no change in the manner of holding appears: & his sureties, as adm'r, will alone be chargeable.

The county ct. may, by its order, release the sureties of an adm'r or guardian.

The bond of an adm'r should be payable to the commonwealth—but is not void if the justices of the co. court, by their names, are the obligees.

GEORGE BELL, in 1809, was appointed administrator of Joseph Fuquay, deceased, and gave bond, with Johnson and Smith as his sureties. He was afterwards, in 1810, appointed guardian to Fuquay's infant children, and gave bond, with Johnson and Griffith as his sureties. In 1813, having been summoned by Johnson and Griffith, for that purpose, before the county court, he gave a new bond, as guardian, with Smith and Wallace, as his sureties, and as administrator, with Smith, Wallace and Hocker as his sureties; and again in 1814, gave another bond as administrator, with Cerby as his surety—an order having been entered, at the giving of each of said bonds, *that the former sureties be released from further responsibility.*

The heirs of Fuquay, having attained full age, brought their bill against the administrator of Bell and said Johnson, Smith, Griffith, Wallace, Hocker and Cerby, or the personal representatives of such of them as had died, praying a decree against some or all of them, for a balance of personal estate in the hands of said Bell as administrator of their father, and compensation for certain slaves that had been sold by him—there not having been any debts requiring such sale.

Each of the sureties endeavors to shift the responsibility from himself upon the others; and they all unite in an effort to place the most of it upon the shoulders of Bell's administrator, for an alleged *devastavit*. He rests his defence upon a *plene administravit* in the payment of other debts, as to all the assets that came to his hands, except some slaves, that were sold, and the proceeds distributed among Bell's heirs, before he had notice of this claim.

The circuit court, by its decree, held the administrator of Bell primarily liable in his individual capacity for the amount ascertained to be due Fuquay's heirs, to the extent of the *devastavit* committed in distributing Bell's slaves, and all the sureties in the various administration bonds jointly liable for the residue. The sureties in the guardian bonds were held, as such, not to be liable at all.

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We approve the decree so far as the principle upon which it subjects the administrator of Bell individually for the *devastavit*, committed in distributing Bell's slaves, and so far as it exonerates the sureties in the guardian bonds, as such. It was immaterial whether the administrator had notice of this claim at the time of distributing the slaves. He is equally liable for the *devastavit* whether he had notice or not. If he made the distribution without requiring the indemnity he was entitled to by law, it was his own folly, and he must now look to the distributees for redress.

As there was no proof or circumstance calculated to shew a change or transfer of the assets in Bell's hands as administrator, into a holding in his character as guardian, there is no reason for charging his sureties in the latter capacity.

We cannot approve so much of the decree as makes all the sureties, in the different administration bonds, jointly liable. According to the principle of decision in the case of *Wilborne vs. Commonwealth*, 5 J. J. Mar. 617, Cerby, the surety in the last administration bond, is alone responsible, the orders of the county court having completely released the sureties in the prior bonds.—The words of the act of assembly regulating the duty and power of the county courts on this subject, as it respects administrators, are so far similar to those used with respect to guardians, that there is not room for any difference of construction.

But it is contended that Cerby is not liable, because the bond, executed by him, was given to the justices of the county court, by their names, instead of to the commonwealth, as the law then required. There is no doubt the bond should have been given to the com:

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monwealth, and that the county court had no right to exact one in the form in which this was executed ; but it does not thence follow that the bond is void. We know of no statutory provision, or principle of the common law, that renders such a bond void.

The decree must be reversed, with costs, and the case remanded, with directions for a decree pursuant to this opinion.

CHANCERY.

## Moore and Others *against* Young.

[Mr. James Trimble for Plaintiffs : Messrs. Depow and Sanders for Defendant.]

FROM THE CIRCUIT COURT FOR BATH COUNTY.

November 5.

Judge NICHOLAS delivered the Opinion of the Court.

Before a debtor's choses in action can be reached by bill in chancery, there must be an ex' on returned 'no property,' by the proper officer; such return on a *fi. fa.* sent to a county in which the defendant does not reside is insufficient.

Chancery has jurisdiction of the demand that accrues to a surety upon his paying the principal's debt: but cannot subject his choses in action, without the *fi. fa.* and return required by the statute. Whether a return of no property on a *fi. fa.* for one debt, will authorize a decree subject-

YOUNG filed his bill against Joseph Moore, Reuben Moore and others, alleging a judgment in his favor against Joseph Moore, with a return of no estate, made upon a *feri facias*, which issued thereon, and certain payments made by him for Joseph Moore, as his surety, and praying satisfaction of his judgment and the other demands, out of a claim on others, that Reuben Moore holds, as is alleged, for the benefit of Joseph Moore. The bill was taken for confessed, and a decree rendered against Reuben Moore, for part of the demand set up; and to reverse that decree he prosecutes this writ of error.

We think the bill shews no cause for a decree against him. The record of a common law judgment and *feri facias*, filed as an exhibit, shews that the judgment was obtained in Bath, upon a service of process in that county, and that the only *feri facias* which issued was directed to Montgomery, and returned by the sheriff of that county. There is no allegation that Joseph Moore resided in Montgomery; and the complainant has not, therefore, brought himself within the provisions of the act subjecting choses in action to the satisfaction of judgments by bill in equity. The return was not made by the proper officer.



Though the court had jurisdiction to render a decree against Joseph Moore, for the sums paid by Young, as his surety, yet that did not carry with it the right to subject, in the same proceeding, for the payment thereof, the claim which Reuben Moore held in trust for Joseph Moore. The remedy for subjecting *choses in action* by bill in equity is purely statutory, and the courts have no power to enlarge it beyond the provisions of the act. It can be made to embrace no case where a *feri facias* upon a judgment or decree has not been returned no property.

Whether, if the *feri facias* which issued on Young's judgment had been returned by the proper officer, that would not have superseded the necessity for a decree and execution as to the other demands set up in the bill, need not now be determined.

Decree reversed, with costs, as to Reuben Moore, and cause remanded, with directions for a decree dismissing the bill as to him.

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1833.

*Craig*  
vs.  
*Austin et al.*

ing the defendant's *choses in action* to the payment of another debt of the same creditor—not determined.

### Craig vs. Austin et al.

EJECTMENT.

[Mr. Crittenden for Appellant : Mr. Sanders and Messrs. Morehead and Brown for Appellees.]

FROM THE CIRCUIT COURT FOR GALLATIN COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *November 7.*

THIS is an action of ejectment for a lot in the town of Port William, claimed by the lessor (plaintiff in error,) under a deed from one Gatewood, in 1830.

After a regular deduction of title from the trustees to Gatewood had been shewn, the record states, that evidence was introduced conducing to prove, that one Tarrant was in possession of the lot, in 1811, "*claiming by purchase, under Gatewood ;*" and that Tarrant transferred the possession to Lance; and Lance to Chipp, and Chipp to one Searcy.

sion.—A party in possession may rely upon his right as adverse until it is shewn by proof, that he is estopped, by having entered under an executory contract, as a *quasi* tenant, or the like.

Where it appears that a tenant in possession entered under an executory contract, a jury may infer a legal conveyance from facts which do not amount to a legal presumption of a deed: but not from the single fact of 19 years possession.

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1833.

Craig

vs.

Austin et al.

It was also proved, that Searcy, being still in the possession of the lot, in 1821, it was sold in virtue of an execution against him, and was purchased by the defendants, to whom a conveyance was made by the officer who sold it ; and that the defendants had retained the actual possession ever since, claiming to hold "*adversely to the world*," and were in the possession at the date of Gatewood's deed to the lessor, Craig.

Upon that proof the circuit court instructed the jury that, if they believed that the defendants were in the adverse possession of the lot at the date of Gatewood's deed to Craig, they should find for them ; and thereupon verdict and judgment were rendered for the defendants.

Whether the facts which were proved authorized the verdict, is the only question to be considered by this court.

If it be admitted that, according to the case of *Phillips vs. Rothwell*, 4 Bibb, 34, the defendants, though they had a deed, could not have been permitted to hold otherwise than as Searcy (whose title they bought) held, or should be presumed to have held, at the time of the sale under execution, still we are of the opinion that, however the probabilities might preponderate, the jury had a right to infer, that Searcy held adversely to the title of Gatewood. Had it been proved, that Searcy entered as the *quasi* tenant of Gatewood, by executory contract of purchase, then, although a jury may be allowed to infer the execution of a conveyance from facts which would not create a "*legal presumption*" of a deed, nevertheless the lapse of nineteen years, without any other circumstance, would not have authorized such a deduction by the jury.

But the facts do not necessarily prove that Tarrant entered under an executory contract. It was incumbent on the plaintiff to shew, that Tarrant entered as a tenant, or in virtue of an executory agreement, before he could shew that he had been estopped to hold or claim adversely to Gatewood. Evidence conducing to prove that Tarrant claimed to hold "*by purchase*," does not prove conclusively that he entered under an executory agreement. And it is not material to enquire whether

the word purchase, as thus used, would be merely interpreted according to its technical or its popular import; because, we think that the jury had a right to infer, in the absence of proof to the contrary, that Tarrant claimed and held the lot as his own, under an executed contract of purchase. If he claimed to hold independently of Gatewood, (and he had a right to do so unless he looked to Gatewood for a title,) the jury had a right to infer that he did hold, and had a right to hold, adversely, unless there had been proof of some estoppel—such, for example, as the fact that he entered as the tenant, or *quasi* tenant, of Gatewood. The proof of that fact devolved on the plaintiff, and, as already suggested, whatever may be the preponderating tendency of the testimony, it does not *prove*, that Tarrant entered as Gatewood's tenant, or that he entered under an executory agreement of purchase. And the jury had a right to find that his possession was, both in fact and in law, adverse, or under a legal title acquired from Gatewood "*by purchase.*" And if his possession was adverse, that of the defendants was, *a fortiori*, adverse, at the date of the deed to Craig.

Wherefore, the judgment must be affirmed.

Fall Term

1833.

Fry

vs.

Rees.

## Fry vs. Rees.

COVENANT.

[Mr. Monroe and Mr. Wall for Plaintiff: Mr. John Trimble for Defendant.]

FROM THE CIRCUIT COURT FOR HARRISON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

November 7.

GEORGE REES, holding a bond on Mounts and another bond on Trabue, for the conveyance of a tract of land, sold the land to Robert Patterson and James Patterson, and covenanted to assign to them the said bonds, which had been assigned to himself and Isaac Rees. Afterwards, he, in his own name alone, assigned the bonds to Robert

On the trial of an issue upon a plea of want of consideration—the question must be submitted to the jury for their decision upon the facts, and their

inferences from the facts; and instructions which assume that the covenant sued on was founded on a supposed liability, in the absence of proof that such was the sole consideration, are erroneous.

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and James Patterson ; and, some time after that assignment, he gave to James Fry the following obligation :—  
 “Whereas, Robert Patterson is about to execute a deed to James Fry, for about eighty four acres of land, on Gray’s run, being the place upon which said Fry now lives ; and whereas, George Rees sold said land to said Patterson ; and by several suits of ejectment, in the Harrison circuit court, a part of said land has been gained from said Fry, supposed to amount to about nineteen acres : now said Rees binds and obliges himself to purchase for said Fry, said land, or to secure him in the land so lost, and to indemnify him against said recovery.”—Dated 19th October, 1816.

“GEORGE REES, (Seal.)”

Upon that obligation, Fry sued Rees, in covenant, for damages. Rees pleaded that there was no consideration for the covenant ; and the jury, sworn to try the issue on that plea, found a verdict for Rees ; on which the court rendered judgment in bar of the action.

The tract of land described in the covenant is a part of the tract which Rees had sold to the Pattersons. But, there being no other proof of a consideration, or of the want of consideration, than what may be inferred from the covenant itself, and from Rees’ bond to the Pattersons and his assignments of the bonds for a conveyance, the court instructed the jury, “that, if the defendant was not responsible to Patterson for said lost land mentioned in the declaration ; and executed the writing declared on, under a mistaken belief that he was responsible for said lost land, when in fact he was not responsible for the same, then the said writing was executed without consideration and void.”

If Rees undertook, in his contract of sale, to do no more than to assign the bonds on Mounts and Trabue, and if he did assign those bonds in fulfilment of his obligation, he was certainly not legally responsible to his vendees for the loss of the land. But we are inclined to think that the facts did not authorize the inference that he was not liable to them ; especially as, by his covenant, he undertook to assign to them bonds which, *prima facie*, belonged to him and Isaac Rees jointly, and his

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Fry  
vs.  
Rees.

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assignment did not transfer the entire or legal right to those bonds. But, if the jury were justified in finding, that he was not responsible to his vendees on his covenant, still the instruction cannot be sustained, for the following reasons. *First.* There was no proof that the supposed liability of Rees was the only consideration for his covenant to Fry. *Second.* It may be reasonably inferred, from the tenor of that covenant, that there was a consideration as between Fry and Rees. It may be presumed that Patterson was liable to Fry for the lost land; and he may not have been willing to accept a deed from him, unless Rees had given the covenant on which the suit is founded. These circumstances alone might reasonably be deemed evidences of a consideration from Fry; and, therefore, the fact that Rees was not liable to Patterson, would not be decisive or even material. *Third.* There is no proof that Rees "executed the writing declared on, under a mistaken belief" that he was responsible to Patterson, for the lost land; and the facts tend to the conclusion that there was no such mistake as to his liability. Whether, however, there was a mistake, or whether Rees was liable to Patterson, the jury had a right to decide. But as it would not necessarily follow that there was no consideration as between Rees and Fry, even were it admitted that Rees was not liable to Patterson, and erroneously supposed that he was, the court erred in not, by its instruction, leaving the jury free to determine whether there was any consideration from Fry.

Wherefore, the judgment must be reversed, and the cause remanded for a new trial.

Fall Term  
1833.

EJECTMENT.

## McCulloch vs. Myers.

[Messrs. Morehead and Brown for Appellant : Mr. Monroe and Mr. Payne for Appellee.]

FROM THE CIRCUIT COURT FOR GRANT COUNTY.

November 7. Chief Justice ROBERTSON delivered the Opinion of the Court

The deed of a nonresident acknowledged before the mayor of a city in which he resides, (tho' his residence be but temporary, and he a citizen of another place,) may be admitted to record in the county in the state where the land lies.

Prior to the act of 1810, a deed could not be admitted to record in the county where the land lay, upon a certificate of acknowledgment before the clerk of another county, or the clerk of the court of appeals.

In this case, we deem it proper to consider two only of the various questions which have been argued:—

*First.* When a deed, acknowledged before the mayor of the city of Richmond, in Virginia, for land in this state, recites that the grantor was not, at the date of the acknowledgment, a citizen of Richmond, but of another place in Virginia, can the mayor's certificate authorize the clerk of the county in which the land lies, to record the deed in his office, without any other proof?

*Second.* Prior to the statute of 1810, 1 *Digest*, 323, could a deed for land in this state have been legally admitted to record in the clerk's office of the county in which the land lay, without any other proof than a certificate by a clerk of some other county (in the state) that the deed had been proved or acknowledged before him?

I. A proper interpretation of the statute of 1797, 1 *Dig.* 313, requires an affirmative answer to the first question. It was evidently the object of that act to allow a nonresident of Kentucky to acknowledge a deed for land lying within her jurisdictional limits, before the mayor of any foreign city of which the grantor was at the time of acknowledgment, a *resident*. Residence, either permanent or temporary, in the city of Richmond when the deed was acknowledged, is all that the act of 1797 (*supra*) required, and the certificate of the mayor imports such a residence by the grantor, although he was not a *citizen* of Richmond.

II. But a different answer must be given to the second question. Prior to 1810, there was no law authorizing a clerk to record a deed for land lying in his

county, upon a certificate of proof or acknowledgment before a clerk of any other county. Wherefore, the clerk of Pendleton had no authority to record in his office the deed from Jordan Harris, without any other proof than the certificate of the clerk of Fayette county. Nor did the same certificate alone authorize the clerk of this court to record the deed in his office. The circuit court consequently erred in admitting a copy of the deed from Jordan Harris to be read on the trial as competent evidence. For that cause, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

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1833.

*Simpson*  
vs.  
*The Com'lth.*

## Simpson vs. The Commonwealth.

SCIRE FACIAS.

[Mr. James E. Davis for Plaintiff: Atto. Gen. Morehead for the Commonwealth.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

November 8.

It seems to this court, that the circuit court erred in overruling the demurrer to the *scire facias*.

*First.* The *scire facias* does not show, that the recognisance had been returned to the circuit court as required by law. *Madison vs. The Commonwealth*, 2 Mar. 132.

*Second.* The recognisance contains a condition, that it should be void if the principal should appear in the circuit court to answer "*the charge herein*," and gives no other description of the charge.

The *scire facias* states that it was a charge of felony. This apparent variance cannot be corrected by reference to any previous record, made up two days before the date of the recognisance. The recognisance is not good on its face; it contains nothing that would show that the principal cognisor was charged with a felony. Nor is there such a connection between the recognisance

A *scire facias* on a recognisance for the appearance of a party in court, must shew that the recognisance was transmitted to the court.

If a *scire facias* recites that the def't was recognised to appear and answer a charge of felony, when the recognisance specifies no charge, the variance is fatal, - and cannot be cured by reference to a record compounded before the recognisance was

taken.—A recognisance that does not show that the party for whose appearance it is taken, is charged with felony, is defective and void.

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1833.  
*The Com'ltth*  
vs.  
*Tibbs.*

and the record of the prosecution, which had ended two days before its date, as to supply the defect of description in the recognisance by reference to the record.

The demurrer presented nothing but the recognisance and the *scire facias*. The recognisance being insufficient, the demurrer ought to have been sustained.

Wherefore, the judgment of the circuit court is reversed, and the case remanded with instructions to sustain the demurrer.

# INDICTMENT.

## The Commonwealth vs. Tibbs.

[Atto. Gen. Morehead for the Commonwealth : Mr. Crittenden for Defendant.]

FROM THE CIRCUIT COURT OF LAUREL COUNTY.

November 9.

Chief Justice ROBERTSON delivered the Opinion of the Court.

GREENBERRY TIBBS was indicted for challenging Jonathan McNeel to fight with deadly weapons in single combat ; and on the trial, the proof was, that immediately after they had been quarrelling, Tibbs said to McNeel, "*I am told you carry weapons for me—I will fight you a duel with a pistol or a rifle, from one step to a hundred yards.*" Upon that proof, the jury found a verdict of not guilty.

The only question which we shall consider, is, whether the words which were proved, amount to a challenge within the meaning of the act of assembly.

It is impossible to define, with precision, what words will, *ex vi termini*, import a challenge to fight a duel; but we are of the opinion, that the words which have been quoted, do not necessarily amount to such a challenge as was contemplated by the penal statute of this state.

No words that should not be construed as a *requisition*, *demand*, or a *request*, to fight, should be deemed a challenge to single combat.

When the occasion and other accompanying circumstances are considered, the words which were proved in

A challenge, within the meaning of the statute against duelling, is a *requisition*, *demand*, or *request*, to fight with deadly weapons: expressing a readiness to accept a challenge, does not amount to challenging. Words insinuating a desire to fight with deadly weapons—as they tend to provoke such combat, may amount to a misdemeanor at the common law.

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this case, do not import, necessarily, or by clear implication, such a requisition, demand, or request; but rather evince only a *willingness* to fight, if *McNeel* should desire such a rencounter.

Such words might amount to a misdemeanor, at common law, for they may be deemed an "*insinuation*" of a desire to fight with deadly weapons, which might provoke such a combat, and which, therefore, is punishable as a misdemeanor. (1 *Hack. pleas of the Cr. c. 63. §8.*) But Tibbs was not indicted for such a misdemeanor. And the jury, under all the circumstances, had a right to find that he had not been guilty under the act of assembly.

Wherefore, the judgment of acquittal is affirmed.

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1833.  
Daviess  
vs.  
Arbuckle.

## Daviess vs. Arbuckle.

PET. & SUM.

[Mr. Richardson for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

November 9.

THE issue formed, was made upon the plea of payment. By agreement, the parties had leave, under this issue, to give in evidence any matter that might be specially pleaded.

The record states, "that after the parties had closed their evidence, the counsel for the defendant was proceeding to argue the case to the jury, whereupon the counsel of the plaintiff objected to the defendants counsel proceeding with their argument, and claimed the right to open and conclude the argument; and the question being made to the court, it was decided that the plaintiffs counsel had the right to open and conclude the argument, which was done accordingly."

We think it fairly inferrible from the exception taken, that both parties gave evidence having a legitimate bearing upon the matters in issue. Irrelevant testimony

Where, by the pleadings, the def't holds the affirmative, not relying on any negative plea as a bar to the action—if he offer any proof whatever in support of the defence pleaded, the right to open & conclude the argument, appertains to him:— But if no such proof is offered, the right belongs to the plaintiff.

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1833.

Davies

vs.

Arbuckle.

should have been rejected, and we cannot suppose that any such was offered. The presumption is, unless the contrary appears, that the evidence was pertinent. If, therefore, the defendant gave any evidence conducing to sustain the plea or issue on his part, the court should have allowed his counsel to open and conclude the argument.

The opinion of this court in *Goldsberry vs. Stuteville*, 3 Bibb, 346, goes even further, and gives the opening and concluding speech to the defendant where he puts in an affirmative plea only, although it is wholly unsupported by evidence. We are not inclined to go to that extreme. When the defendant gives no evidence in support of his affirmative plea, we see no reason for allowing him to open and conclude the argument. The false pleading of a party ought never to be the means of securing to him an advantage. But where there is any evidence conducing in the slightest degree to sustain the defendant's affirmative plea, he should be permitted to make the most of it, by opening and concluding the cause; provided there is no negative plea relied on as a bar, in whole or part.

If the defendant gives no evidence in support of his affirmative plea, there is nothing to argue about, growing out of such plea. If an attorney should attempt to prove by argument, that the plea of payment was true, when there was not a particle of proof, 'it would be a disorderly proceeding, for which he ought to be silenced by the court. There must be facts to base the argument upon. If there are no facts, then a false count, or a false plea, is an artifice to deprive the adverse party of his right to open and conclude the argument. The court is not bound to tolerate the trick. By discountenancing it, attorneys will be taught to regard the true objects of pleading, and our records will not be incumbered with irrelevant counts and pleas. We approve the doctrine laid down on this subject in *Sodousky vs. McGee*, 4 J. J. Marsh. 275.

As we must presume that the evidence admitted had some relevancy to the matters in issue, we think the court erred in refusing to let the defendant open and

conclude the argument. If the record had stated that there was no evidence in support of the plea, we should then have entertained a different opinion.

Judgment reversed, with costs, and cause remanded for new trial.

Fall Term  
1833.

*Wayman*  
vs.  
*Taylor.*

*Dissent.*

*Judge Nicholas* concurs in the reversal of this case, but he thinks the matter of practice, as to where the right belongs of opening and concluding, settled in *Goldsberry vs. Stuteville*, should not now be disturbed even if that case were wrong; but he thinks the case is right, and that settles the point on correct principles.

## Wayman vs. Taylor.

TRAVERSE.

[Mr. Monroe for Appellant: Messrs. Morehead and Brown for Appellee.]

FROM THE CIRCUIT COURT FOR CAMPBELL COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

November 9.

TAYLOR proceeded against Wayman, for a forcible entry. The jury, on the trial of the warrant, found Wayman guilty; and thereupon the justice of the peace rendered a judgment for restitution, and for costs.

The warrant was set for trial on the 14th of April, 1831. It seems that Wayman, on the next day, executed a traverse bond, in conformity to the act of assembly regulating proceedings in such cases, and the justice of the peace returned the warrant and bond, together with a transcript of the verdict of the jury and his judgment, to the circuit court, but not within ten days after the trial.

On Taylor's motion, the circuit court dismissed the suit, and rendered a judgment against Wayman for costs.

If the decision of the circuit court be correct, it is so upon one or both of the following grounds. *First*, because the justice did not return the papers within ten days, as required by the statute; and, *second*, because

The finding on a warrant of forcible entry being traversed, the justice should return the papers to the clerk's office within 10 days—but his failure to do so, is not cause for a dismissal; nor should it prejudice either party.

A recital in a traverse bond, that an obligor had traversed the inquisition, estops him from denying the fact—Bond having been duly executed and the papers returned to the circuit ct.

the proceedings may be presumed (nothing appearing to the contrary) to have been regular, and if no traverse is found with the papers, one may be filed *nunc pro tunc*.

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1832.

Wayman  
vs.  
Taylor.

Wayman did not file a written traverse with the justice in three days, according to the form prescribed by the statute.

As to the first point, we are of opinion that the statute is merely directory to the justice, and that the rights of litigants should not be affected by his negligence; and therefore the suit should not have been dismissed on that ground.

Upon the second point, we are of opinion, that the traverse bond, which was executed on the day after the trial, and which, according to the form prescribed by the statute, acknowledges and declares, that "the inquisition hath been traversed by the said Wayman," is an estoppel on the part of Wayman, and precludes him from denying that he had filed a formal traverse with the justice previous to the execution of the bond. The justice ought not to have taken the bond without a traverse of the inquisition. The bond secured Taylor in all things which the law required he should be secured in, as a preliminary to a trial of the traverse in the circuit court. Upon the execution of the bond, within three days after the inquest, the statute directed the justice "to stay all further proceedings on the inquisition, and return the whole of the papers and proceedings, or a fair transcript thereof, to the office of the circuit court." This being done, the statute declares "that executions for cost, or for restitution, shall issue from the office of the circuit court, according to the judgment in the cause;" thus showing that the powers of the justice ceased upon the execution of the traverse bond within the time prescribed, except merely the transmission of the papers. Under such circumstances, and in the absence of proof to the contrary, we think the circuit court should have presumed that all things were rightly acted, that a traverse had been filed with the justice, although not returned, and should have suffered its loss to be supplied by filing another *nunc pro tunc*. The issue would thus have been made up in a manner not injurious to Taylor, and a fair trial had upon the merits.

Judgment reversed, with costs, and the cause remanded for proceedings in conformity to this opinion.

Fall Term  
1833.

# Dailey vs. Gaines.

SLANDER.

[Messrs. Sanders and Depew for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR FRANKLIN COUNTY.

Judge UNDERWOOD delivered the Opinion of the Court.

November 9.

Two points only present themselves in this case:—

*First.* Do words proven to have been spoken in the second person, sustain a count for slander in which the words alleged to have been spoken, are in the third person?

*Second.* Is the affidavit of the defendant, upon a motion for a new trial, sufficient evidence of the fact, that one of the jurors was the uncle by marriage of the plaintiff, and of surprise on the part of the defendant, that a juror thus disqualified constituted one of the pannel?

The first point was decided by this court, in the case of *Huffman vs. Shumate*, 4 *Bibb*, 515. It is now more than seventeen years since that case laid down the true doctrine to be, that a declaration charging the speaking of words in the third person, was substantially supported by proof of words uttered in the second person. The court advert to the opinion given by Lord Mansfield in the case of *Averillo vs. Rogers*, and disallow the distinction taken by his lordship, as the foundation of the difference between words spoken in the second and in the third person. Perhaps it is not altogether true, that the reason for the difference is based upon the ground, that slanderous words spoken in the second person are generally attended by passion, whereas those spoken in the third person are usually the consequence of cold and deliberate malice. Words may be spoken either way, through heat, or with calm and deliberate malice. The distinction may probably find a more congenial foundation in the technical notions which at one time required great strictness between the *allegata* and *probata*. Be the origin of the doctrine what it may, the commendable research of counsel for the plaintiff in error, has

A declaration in slander charging words as having been spoken in the third person, is sufficiently sustained by proof of words spoken in the second person.

The affidavit of *a part* (uncontradicted) that a juror as related to his adversary, is sufficient evidence of that fact, upon a motion for a new trial.

The allegations of an affidavit, upon a motion for a new trial, may be met by counter affidavits,—to take which time may be allowed, if required.

Affinity is cause of principal challenge to a juror—the uncle, by marriage, of a party is not competent.

Fall Term

1833.

Dailey

vs.

Gaines.

clearly shewn, that the doctrine of Lord Mansfield prevails in England and in several of the American states. Notwithstanding this, we think it best to adhere to the case of *Huffman vs. Shumate*. It has been long acquiesced in. It cannot operate as a hardship upon a defendant to require him to go to trial prepared to justify what he has said, whether it be in the second or third person. And as to the distinction founded on the difference between words spoken in anger and passion, to the face, and words spoken in mere malice, behind the back, it is no more than any other circumstance which can address itself to the good sense of the jury, and have its proper influence in regulating the amount of the verdict. The jury may just as well make a proper allowance for the manner in which the words were spoken in the first action, as to do it in a second suit, after the court has nonsuited the plaintiff. The amount of the verdict should depend upon the evidence, and not upon the averments in the declaration.

Upon the second point, we are of opinion, that the affidavit of a defendant is sufficient. It was so settled in the case of *Ewing vs. Price*, 3 J. J. *Marshall*. 520. If the plaintiff disputes the facts stated in a defendant's affidavit, on application to the court for that purpose, time should be allowed to take and file counter affidavits. In this case, the nature of the fact stated by Dailey, is such, that we must presume it to have been within the knowledge of Gaines. If it was not true as stated, it was as easy to prove that the juror was not the uncle by marriage of the plaintiff, as to prove the affirmative. There was no countervailing proof offered, and we feel bound therefore to take Dailey's affidavit as true.

That affinity, as well as consanguinity, constitutes a ground of "principal challenge" to a juror, we have no doubt. The relation between the plaintiff in the circuit court, and the juror Stevens, he being the plaintiff's uncle by marriage, was within the degrees which rendered the juror incompetent. The affidavit of Dailey shews a case of surprise.

Wherefore, the judgment is reversed, with costs, and the cause remanded for a new trial.

Fall Term  
1833.

**Doyle and Others (his children) against  
Sleeper and Alsop.** CHANCERY.

[Messrs. Morehead and Brown for Plaintiffs : Mr. Beatty and Mr. Combs  
for Defendants.]

FROM THE CIRCUIT COURT FOR MASON COUNTY.

In this case, the several members of the Court delivered Opinions *seriatim*. November 11.

CHIEF JUSTICE ROBERTSON:—In 1829, a *feri facias*, which had been issued on a judgment in favor of Sleeper and Alsop against Henry G. Doyle, on a note given in 1818, having been returned “no property,” they filed a bill in chancery against him and his two infant children, (William Tod Doyle and Mary Elizabeth Ann Doyle) alleging that the father, being indebted to insolvency, bought with his own money, two fractions of lots in the town of Maysville, in this state, and with the design of defrauding his creditors, procured conveyances from the vendor (Lucas) to his said children nominally, but in truth, for his own use and benefit; and they therefore prayed for a decree for subjecting the lots to the satisfaction of their judgment.

H. G. Doyle’s answer denied the charge of fraud, and averred that the money which had been paid for the lots, was the property of the children to whom the title had been conveyed.

The answer of the children, by a guardian *ad litem*, required proof of the material allegations of the bill, and reiterated the averment that it was their money, and not that of their father, which he had paid for the lots.

One of the deeds was made in 1825; the other in 1827.

Only two depositions were read on the hearing of the cause in the circuit court. One of them proved that H. G. Doyle paid for the lots, made the contracts for them, and required the vendor to convey the title to his (Doyle’s) children, alleging that he had bought the lots for them. The other witness proved that, about

Statement of the case.—A party buys an estate, pays for it, and has the title made to his children; his creditors file a bill to subject it to the payment of his debt:—the debt having been contracted before the purchase; the answers of father and children denying that it was an advancement to them, and other circumstances indicating an intent to defraud creditors—held that the estate was liable for the debt—Judge Nicholas dissenting.

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the date of the contract for one of the lots, H. G. Doyle was in good practice as a physician in Maysville, was "*pressing collections*," and told the witness that he was endeavoring to raise money to pay for the lots.

The witness also swore, that H. G. Doyle, afterwards, told him that he had the title conveyed to his children, to save the property from a heavy debt which had been devolved on him by the fraud of a partner in trade.

The circuit court having decreed that the lots should be subjected to the satisfaction of the judgment, this writ of error is prosecuted by H. G. Doyle and his two children to reverse the decree.

An insolvent father having purchased land, and taken the title to his children—his answer in a suit to subject it to his debt, or his declarations after the conveyance, may not be evidence against them:—his indebtedness at the time, and payment with his money, are evidence against them. That they (infants,) had money to make such purchase, will not be presumed, in the absence of proof.

As against H. G. Doyle, his *insolvency* at the dates of the deeds, and the fraudulency of his motive in procuring the titles to his children, are satisfactorily established. But, though the children may be deemed volunteers, it may, perhaps, be admitted, that neither their father's answer, nor his declarations to the witness after the dates of the deeds, should operate essentially to their prejudice. However that may be, two important facts are sufficiently established against the children, without the declarations or the answer of the father: *first*, his indebtedness at the dates of the conveyances to them: *second*, the payment of his own money for the lots.

The *first* is proved by the judgment of the defendants; and the *second* must be inferred from the facts which appear. This court cannot, *in the absence of any evidence to that effect*, presume that the infants had money of their own; and, if they had, the fact was susceptible of proof, and would probably have been proved. As there is no such proof, the rational inference from the fact that H. G. Doyle paid for the lots, would be, that the money was his own. Moreover, a fact proved by one of the depositions tends strongly to the same conclusion, and fortifies the legal presumption. The money must, therefore, be deemed to have been H. G. Doyle's.

If a father holds the title to real estate, and bringing much in-

Had H. G. Doyle held the legal title to the lots, and conveyed it to his children for no other consideration than that of blood, his indebtedness at the time, would.



according to the established interpretation of the statute against fraudulent conveyances, have rendered the conveyances fraudulent, *per se*, for the benefit of all his *bona fide* creditors—subsequent as well as precedent.

The consideration of blood may be sufficient, as against subsequent creditors, unless the conveyor was indebted at the date of the conveyance. But such indebtedness, to a material extent, would invalidate the deed as to *all* creditors. Such is the doctrine of legal or constructive fraud, established by a long series of adjudications, upon the statute of 13th Elizabeth, which has been substantially incorporated into a statute of this state; and the same interpretation of the latter statute has been adopted by this court.

But the judges of England, with all their zeal for extending, by a construction peculiarly latitudinarian, the operation of the statute of 13th Elizabeth, never applied it to a case like this, in which the conveyance was made, not *by* the debtor, or *of* his estate, but by another person, at his instance, and in consideration of his money. The statute was never applied to *purchases* by a debtor; but has been construed to operate only on *conveyances by him*—*Procter vs. Warren*, *Sel. Ca. in Lord King's time*; *Lamplugh vs. Lamplugh*, 1 *Pr. Wms.* 111; *Crozier vs. Young*, 3 *Mon.* 157.

It is therefore evident, that the decree which was rendered in this case, is unsupported by statutory authority, and consequently, it cannot be sustained unless it be authorized by the principles of the common law.

The common law abhors fraud of every kind and in every shape; and hence, even in its infancy, it adopted the maxim, that "fraud vitiates *every thing*."

But the charity of the common law will never *presume* fraud; it always requires *some* proof of a fraudulent *intent*; unlike the judicial system built on the statute, it knows actual fraud only; it does not recognise such an abstraction as merely *legal* or *constructive* fraud. It differs, in another particular, from the artificial system engrafted on the statute—it vacates conveyances only for the benefit of prior creditors. In this respect, at least, it may be applicable to this case, because the de-

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*debted*, conveys it to his child, the conveyance will be (*by the statute*) fraudulent and void as to *all* his creditors. If he is not indebted at the time of the conveyance, it may be good against subsequent creditors.

The purchase, by a debtor, with his money, of property which is conveyed to a third party, is not within the statute against fraudulent conveyances. See the concurrent opinion of Judge Nicholas, *post*

Conveyances in fraud of prior creditors are void at common law. But the common law does not apply this rule to subsequent creditors

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A parent may provide for the support and education of his children, notwithstanding his indebtedness. — See the concurrent view, and further consideration of the subject, by Judge U. *post.*

The *choses in action* of a debtor cannot, but by force of the statute, be made liable to his debts by bill in chancery; nor can such things as are not bound by the judg't or ex'cn, be pursued into the hands of those to whom the debtor may have transferred them — Money is not a *chose in action*, nor within the lien of an ex'cn; yet it may be levied on while in the possession of the debtor. Judge N. concurs. See also a different view by Judge U. *post.*

sendants were creditors at and before the dates of the conveyances. Whether it be properly applicable in any other respect, remains to be considered.

The common law looks with an indulgent eye on the parental sympathies, (*Plow. Com.* 307,) and therefore it will permit an indebted father to appropriate his *money* to the education and comfortable maintenance of his children, in defiance of the claims of his creditors, provided his motives be pure, the provision suitable, and the mode of securing it appropriate and eligible. It will not *presume* a false or fraudulent motive for a prudent and allowable provision for those who have paramount claims to protection and sustenance from parental bounty.

It is not forgotten that Lord Northington, in the case of *Partridge vs. Gopp*, (*Ambler*, 596,) held the *donees* of money liable for the prior debts of the *donor*. But it would be difficult to reconcile that decision with either principle, analogy, or authority. The only reason suggested by Northington is, that "he thought that no man has such a power over his property as that he can dispose of it so as to defeat his creditors, unless for consideration." In the abstract, this reasoning is as legal as it is ethical—being no more than the sound maxim, that "a man must be just before he is generous." No man should have such power, over *such* of his property *as may be subjected by process of law to the payment of his debts*, as to be able to defeat the executions of his honest creditors, by donations to his friends or his kindred. But it would be difficult to discover the principle, or approve the reasoning, upon which it could be maintained, that a creditor may, by the process of the law, reach, in the hands of a debtor's child, or donee, that which he could not, by any legal means, have taken from the debtor himself whilst it was in his possession.

In *Bayard vs. Hoffman*, 4 *Johnson's Chan. Reps.* 450, Chancellor Kent seemed to have been inclined to the opinion, that a creditor might, according to the common law, have been entitled to the aid of a chancellor to subject a *chose in action* to the satisfaction of a judgment; and that a *donee* of such an interest might have been sub-

jected to liability for its value. But the weight of authority is opposed to that *dictum* of the distinguished American jurist; and the doctrine to which it inclines, though supported by *Taylor vs. Jones*, 2 *Atk.* 600, has been overruled in England, and has never been deemed to be sound law in this state since the case of *Buford vs. Buford*, 1 *Bibb*, 305. In *Dundas vs. Dutens*, Lord Thurlow said, "is there any case where a man, having stock in his own name, has been sued for the purpose of having it applied to satisfy creditors? Those things—such as stock, debts &c. being *choses in action*, are not liable; they could not be taken on a *levari facias*." Lord Eldon has frequently said that chancery cannot subject stock, *eo nomine*, because there is no *lien* on it, and because, also, the chancellor will not aid the infirmity of the law by taking hold of that which the law exempts from execution. And the last post-revolutionary case cited in *Bayard vs. Hoffman*, *supra*, accords with the prevalent doctrine. In that case, Lord Chancellor Sumners said, that "he had listened very attentively to Lord Thurlow, and he was clearly of opinion that *choses in action* could not be reached by the process of a court of chancery." The legislature of this state virtually recognised that as the true doctrine of the common law, when, in 1821, it passed an act authorizing a court of equity to subject *choses in action* and equitable rights to the satisfaction of judgments; and Roberts, in his treatise on Fraudulent Conveyances, lays down the same doctrine, in page 422.

*Money* is not properly a *chose in action*, and it may be levied on to satisfy a judgment, *if the officer can, without violence, get hold of it*. But an execution does not operate as a *lien* on money, according to the common law; and as money is the common circulating medium, cannot be identified, and loses its individuality by use and circulation, a creditor cannot pursue it in the hands of a stranger. *Roberts on Fraud. Con.* 424, 2d *Am. Ed.*; *Handy vs. Dobbin*, 12 *Johnson*, 220; 1 *Cranch*, 133. The case of *Crozier vs. Young*, *supra*, authorizes the inference that this court recognized the same doctrine. The case of *Halbert &c. vs. Grant*, 4 *Monroe*, 580, intimates the same doctrine.

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In that case, it is true, the sons of a fraudulent alienor were subjected personally to the value of the estate which the father had conveyed to them; but the reason for that kind of a decree was, that the fraudulent alienees had divested themselves of the title by a conveyance to a *bona fide* purchaser, and had thereby put it out of the power of their father's creditor to reach the land which he had fraudulently conveyed to them, and which, while the title was in them, was liable to the payment of the father's debts. And the fact that an adverse title had afterwards prevailed against the father's title, was deemed immaterial; because the title was an unit, and the court would not consider it as divisible, or determine the value of that of the father, but, as he had conveyed it fraudulently to the sons, it was deemed just that they should not be screened by a subsequent purchase of another title, even though it may have been a better title. But it is evident that the decision would have been different had money instead of land been given by the father.

If a party purchase property, pay for it with his money, and cause the conveyance to be made to a stranger, there will be a resulting trust to the payer, and chancery will decree the property subject to his debts. If the conveyance be made to his children as an *advance-ment*, it will be good, and the property will not be liable to the father's debts. But if it appears that the conveyance was not intended as a *bona fide* advancement, but to defeat creditors, it will be deemed fraudulent, and

What effect, if any at all, the execution law of 1828 should have on this point, in any of its bearings, need not be now intimated, because, whatever application it might have in a possible case occurring since 1828, it cannot effect this case, which must be tested by the preexisting law.

If the delivery of money by a father to his child, could be deemed the creation of a debt from the latter to the former, such debt might be attached under the act of 1821. But if the transaction shall be considered, as in this case, only a gift, or even a deposit in trust for the father, there would be great difficulty in shewing, either by principle or approved authority, that the chancellor could, at common law, subject the child to liability for the money to the creditor.

But, as the money of an *indebted* father has been converted into land in the name of his child, if a trust for the father can be inferred, the land so conveyed to the child, nominally, but to the father, really and beneficially, may be subjected to the debts of the father's creditors. A conveyance to a stranger would carry with it a

resulting trust to the person who paid the money. But the relation between H. G. Doyle and the holders of the legal title, in this case, will prevent the implication of a trust from the simple fact that the lots were bought with his money.

May not a trust result, however, for the benefit of creditors, from other circumstances?

The reason why the law will not imply a trust, as between parent and child, from the simple fact that the consideration was paid by the parent and the title was conveyed to the child, is, that from the consideration of blood, the purchase in that mode will be deemed, *prima facie*, an advancement by the parent to the child. But when the presumption of such an advancement can be repelled or destroyed, a trust will result by implication, as between strangers. Thus, in the *second volume of Comyn's Digest, first American Edition, title Chancery, page 766*, it is said that when a conveyance is made to the son in consideration of money paid by the father, a trust will result to the father, if the son had been before advanced by him;—and *second Ca. Ch.* is referred to as authority.

So if it appear, that land bought by the father, with his own funds, had been conveyed to his child, not for the purpose of advancing the child in good faith, but for the sinister and unlawful purpose of defrauding the precedent creditors of the father, then, as the presumption of an advancement is repelled, a trust will result to the father, for the use of his creditors, and, so far as those creditors may be concerned, equity will deem him to be the true owner.

Indulgent as the spirit of the common law certainly is to the claims and obligations incident to the filial relation, it will not permit it to be prostituted or perverted as an instrument of fraud. It will jealously scrutinize every transaction in which an indebted father *ostensibly* provides for his children without paying his just debts; and, if it can find, in the provision itself, or in any extraneous circumstance, a sufficient reason for *strong suspicion* of fraud, or trust, it will not suffer the creditor to

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a sale of the property, to pay the father's debt, may be decreed. [Judge Underwood goes even farther. Judge N. thinks the property thus conveyed to children, cannot be reached. — See their respective opinions, *post.*]

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be eluded by such artifice and indirection, but will consider the parties just as they would have stood had the conveyance been made to the father, as it probably would have been if there had been no creditors to defeat. For, when it may be satisfactorily inferred, that the conveyance was made to the child, not for the honest and benevolent purpose of making a proper advancement, but for the dishonest purpose of securing property to the father's use by a colorable subterfuge, the chancellor should treat the estate as the father's, on the principle of a presumed trust. *Viner, title Fraud. F.—Fletcher vs. Sidley et al. Vern. 490; Styleman vs. Ashdowne, 2 Atk. 481; Pole vs. Pole, 1 Vez 76; Lloyd vs. Read, 1 Pr. Wms. 607; Roberts on Fraud. Con. 424, and notes.* It is thought that these and other authorities abundantly establish the foregoing principle. And is it not reasonable, just, and consistent? Shall a debtor, after converting his whole estate into money, or after acquiring money by his credit or his industry, secure to himself the use and enjoyment of an estate, in land, or slaves, by making his family the nominal depositories of the title, merely to cover the property and defraud his creditors? Should not the chancellor consider the transaction in its genuine, and not in its falsely simulated, character? It is, in fact, a trust—why should it not be so treated, for the benefit of those whose rights were intended to be frustrated by a colorable arrangement, which would never have been contemplated had their claims never existed? Those judges who subjected money and *chose in action* in the hands of the child of an indebted parent, certainly would not have hesitated to subject property which was legally liable. The only argument ever urged against the power of the chancellor to subject a *chose in action*, was, that it was not liable to execution, and the chancellor had no power to make that liable to the payment of debts which the law had exempted. Those who thus argued virtually conceded, that property which is liable, and may be taken from a debtor by execution, against his will, and whilst it is in his possession, could be subjected by the chancellor in the hands of a child of the debtor to whom it had been conveyed for the purpose of defrauding the

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father's creditors. And thus both parties, as well that which opposed as that which defended the doctrine of Lord Northington, united in the opinion, that land fraudulently conveyed to the child, instead of the father, and bought with the father's money, might be subjected to his debts. And no case or *dictum* to the contrary is remembered, or has been cited. If the law will, in favor of creditors, presume that land conveyed by an indebted father to a son whom he had previously advanced, is held by the son in trust for the father, will it not, *a fortiori*, presume a trust when it is evident that the conveyance was made to elude creditors, and secure to the father himself a beneficial estate, so covered over as not to be tangible by the ordinary process of execution?

Roberts says, that "where the object of such original conveyance is the advancement of children, *without any particular badges of fraud*, the children will prevail in equity against the creditors of the parent, even though he were indebted at the time of the purchase." What did he mean by "*badges of fraud*" in such a case? He undoubtedly meant such circumstances as would induce the belief that the land had been bought by the father, but conveyed to the son, not for the exclusive benefit of the son, but for the benefit altogether, or in part, of the indebted parent, and that, therefore, fraud on the father's creditors, and not a provident, *bona fide* advancement to his son, was the true motive of his conduct.

In *Lloyd vs. Read*, 1 Pr. Wms. 607, it is decided that, if the father enjoy the use or take the profits after the majority of the son, an advancement will not be intended, but a resulting trust to the father, for the benefit of his creditors, will be presumed.

In *Styleman vs. Ashdowne* (*supra*), the father, having bought land with his own money, had it conveyed to himself and to his two sons *jointly*, and therefore, Lord Hardwick decreed that the title should not survive to the sons, but should be liable to the father's debts, because that *mode* of conveying the title (whereby the father might have been entitled as survivor to the whole, as the sons, during minority, could not have made par-

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tion,) was incongruous and created, *per se*, a suspicion that a settlement upon the sons in good faith was not the father's object; and that, consequently, fraud on his creditors and a consequential trust to himself, might be fairly inferred.

For a similar reason (the unsuitableness of the ostensible provision for a child) the same kind of decree was pronounced in *Pole vs. Pole*, 1 *Vez.* 76.

Roberts uses the following language:—"disproportion between the provision and the object, as well as incongruity between the means and the end, seems to justify the inference of fraudulent intention"—"a pretended provision or advancement may be condemned by its own inadequacy and incongruity with respect to the design *professedly* in the contemplation of the parent and settler."

That the intention of a father who procures an estate, purchased and paid for by him, to be conveyed to his children, was fraudulent, cannot be inferred from the mere fact of his indebtedness at the time; but slight additional circumstances will justify that inference. See page 532.

It seems that, upon common law principles, fraud will not be inferred from the naked circumstance that the father was *indebted* when the money was advanced by him, and the title, at his instance, conveyed to his child. Some subsidiary fact, either intrinsic or extraneous, will be required by the circumspect chancellor. But, in a transaction so liable to suspicion, slight circumstances will be sufficient to justify the presumption of fraud or of a trust, and to let the father's creditors subject the land as his property in equity, so far as their claims are concerned. This position not only accords with policy and justice, but is sustained by some of the foregoing and other authorities.

*If there be no valid advancement, a resulting trust for the benefit of creditors at least, is unquestionable and inevitable.*

In this case, the insolvency of H. G. Doyle at the dates of the conveyances to his children, though admitted in his answer, has not been conclusively established as against them. Nor does the record furnish the means of ascertaining satisfactorily whether there was any incongruity in the transaction, or whether the means were disproportionate or inadapted to the professed end. Nevertheless all the circumstances, slight as some of them may be deemed to be individually, are



sufficient, when considered altogether, to authorize the judicial deduction, that the lots were not bought by H. G. Doyle, and the titles conveyed to his two infant children, for the purpose of making an allowable and provident settlement for their education and maintenance; but that his chief, if not his only motive, was to secure the estate to his own use, and thus save it from his creditors, by the ostensible intervention of his children's title.

His *ascertained* insolvency *shortly after* the dates of the deeds, is evidence against the children. And not only he, but they also deny that there was any advancement. It is true, that the certificate of publication against them was not perfectly regular; but they are parties here, and have expressly waived all objection that might have been made to the regularity of the proceedings as to parties in the circuit court, and have insisted on a decision on the merits of the case. They have thus recognised and sanctioned the answer filed by their guardian *ad litem*. Such an answer, in such a case, must have *some* effect. The answer, so far as it renounces the idea of an advancement, is not only not contradicted by proof, but accords with the intrinsic probability resulting from the complexion of the whole case. The chancellor should not therefore presume, that the purchase and conveyance of the lots was an advancement by the father to his children, when such a claim is not only not pretended, but is denied by all the parties, and is in itself scarcely probable. Such a presumption against the answer even of infants is not proper or allowable.

All things considered, the facts preponderate against the inference that H. G. Doyle intended a *bona fide* advancement to his children, and tend to prove that his object was to defeat the claims of his creditors, by purchasing, for his own benefit, and having conveyed to his children, property which would have been conveyed to himself had there been no creditors; and that, consequently, so far as such creditors are concerned, he should be deemed, in equity, the true and only owner of the estate. Of course, it may be subjected to the judgment of the defendants. A valid settlement on the children cannot be presumed, contrary to the allegations of

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Parties in this court may waive objections to the preparation of a chancery cause, in the court below, and have a decision here on the merits.— And parties who being infants, answered by guardian *ad litem*, may thus sanction such answer.— Against its denial, the chancellor will not presume that an estate conveyed to them by their father, was intended as an advancement [Judge N. contra, *post*.]

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the answers and to the tendency of other circumstances in the case; and, there being no valid advancement, a trust results necessarily for the benefit of the defendants as precedent, *bona fide* creditors.

In such a case as this, conclusive evidence of fraud or of a trust, should not be required or expected; and if the facts exhibited in this case, when properly scrutinized and legitimately applied, are insufficient for subjecting the lots, the intrinsic difficulty of producing more satisfactory proof in any case of a similar kind, would tend to frustrate justice, encourage frauds, and pervert the sympathies and obligations of kindred into polluted agencies of successful and dishonest stratagem.

The chancellor, in decreeing the sale of real estate, should follow the law, and (unless there is a special cause for selling the whole) sell so much only as will satisfy the decree. — [See the opinions of Judge Underwood and Judge Nicholas, *post* — last paragraph of each.]

But the chancellor, when he decrees the sale of real estate, should follow the law, and sell so much only as shall be necessary for satisfying the decree; unless, from the indivisible character of the estate, or from some other cause, a sale of the whole shall appear to be more advantageous to the owner, or unless he shall assent to such a sale. No such reason for a peremptory sale of either of the entire fractions of the lots, appears in this record; and therefore, as the decree directed such a sale, it must be deemed to be erroneous and prejudicial in that particular, and must, for that cause, be reversed.

In remanding the case it would have been proper to allow other answers to be filed, had not the agreement of the parties in this court required a final decision on the merits, and waived objection to the preparation of the case in the circuit court.

Wherefore, it is decreed and ordered that the decree of the circuit court be reversed, and the cause remanded for further proceedings according to the effect of the agreement filed.

The defendants must pay the plaintiffs in error their costs in this court.

As Judge Nicholas dissents, and Judge Underwood, though he concurs in the conclusion of this opinion, attains that end by a process in some respects different, it has become necessary that the members of the court should deliver their respective opinions *seriatim*.

**JUDGE UNDERWOOD:**—As my views of this case differ from those of my brethren, I deem it proper to deliver a separate opinion. The result of my investigation is, that the estate conveyed by Lucas to Doyle's children, was properly subjected, by the decree of the circuit court, to the payment of his debts contracted previous to the conveyance.

Doyle contracted the debt to Sleeper and Alsop, in 1818. Lucas, at his instance, and in consideration of his money, conveyed the estates to his children, in 1825 and 1827. Doyle's insolvency was ascertained, by a return of *nulla bona* upon the execution, in 1829.

I hold it to be a fraud for the debtor, after contracting the debt, to disable himself, so that he cannot pay it, by disposing of his money or property, which the law subjects to the payment of his debts, in such manner that it cannot be reached by the ordinary process of execution; unless the disposition be made in discharge of obligations, legal or moral.

I hold it to be fraudulent for a person to accept, and hold as a gift, the money or property of an insolvent debtor, and thereby defeat the payment of preexistent debts.

The reason of these rules is very obvious. The creditor trusts the funds in his debtor's hands, which the law has subjected to the payment of the debt. Good faith requires the debtor to have those funds forthcoming to satisfy the demand. The creditor is deceived and honesty violated by any disposition of the funds which defeats the payment of the debt, unless it be made on valuable consideration, or in discharge of obligations enjoined by law. Gratuities cannot be tolerated at the expense of justice.

Money is liable to execution, and may be levied by the officer. *First vs. Miller*, 4 *Bibb*, 311; *Turner vs. Fendall*, 1 *Cranch*, 117; *Cond. Rep.* 261.

The money which Doyle paid Lucas was subjected by the principles of the law, to the payment of the debt

of his children, though it render him unable, or less able, to pay his debts. [See p. 534, also Judge Nicholas' opinion, *post.*] But he has no right to set apart a large fund, or purchase estates, the income to be applied to that purpose, and thus disable himself from paying his debts—such funds and estates should be held liable to his debts.

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**OPINION OF Judge Underwood:** who conceives that, if a father, who is insolvent, buys an estate, pays for it, and has the title made to his children, it is a fraud upon his creditors—and the estate a trust in the hands of the children, which should be held liable for the father's prior debt

Where a debtor has effects subject to execution, and so disposes of them, that they cannot be reached by his creditors, it is fraudulent, not only in him, but in the party who accepts or receives the effects.

Money may be taken under execution. See p. 534.

A man may defray the current, necessary expenses.

debts. [See p. 534, also Judge Nicholas' opinion, *post.*]

But he has no right to set apart a large fund, or purchase estates, the income to be applied to that purpose, and thus disable himself from paying his debts—such funds and estates should be held liable to his debts.

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due Sleeper and Alsop. Doyle failed to apply it in satisfaction of the debt. He handed it to Lucas, as a consideration and inducement to the execution of the deeds to his children; thereby substituting in lieu of the money, which he owned, estates for his children, the title to which was never in him, and upon which no execution in favor of Sleeper and Alsop could be levied.

The proof of these facts is, to my mind, proof of actual fraud. Why did Doyle thus disable himself, and divert his means from the satisfaction of an existing debt? Was he under any legal or moral obligation to do so? None whatever. I admit that a man is both legally and morally bound to provide necessaries for his children. I also concede that he may, and ought to provide necessaries for them at the expense of his creditors; that is, he should use so much of the property in his hands as would furnish his children with food and raiment, and such education as is suitable to their condition in life, although by so doing he might subtract from the means of paying his just debts. But beyond that, he has no right, founded on law or morals, as I conceive, to provide for his children at the expense of creditors. It is the present wants of children, or wants of the current year, which may be supplied under the idea of necessaries, and not such as may be anticipated in future years. Hence I reject the idea that a father can give to his infant son, a year old, two thousand dollars, upon the supposition that it will require a hundred dollars per annum to supply him with necessaries during his minority. How can he tell that his son will live so long? Indeed, I reject the idea of a donation, or setting apart of funds for the use of the child, while the father is indebted, altogether.

The child during minority is, in legal contemplation, subject to disabilities, and requires the parent to act for him. If funds were, therefore, given, it would be the parent's duty, as natural or statutory guardian, to manage them. The extent therefore to which the doctrine of supplying a child with necessaries can be carried, is to allow the parent to use his means for the present benefit, for the maintainance and education of his child from

year to year, as above; and if in so doing, he becomes less able to pay his debts, and a greater loss falls on creditors, they have no ground to complain of a fraudulent appropriation of the debtor's means. Debtors, however, often think, or pretend to think, that they may go much further in point of morality, and would have the law fashioned accordingly. It is a difficult thing to bring home to the conscience of the debtor, the fact, that creditors feel hunger and cold, and may have wives and children whose wants are to be supplied. The statutes against fraudulent conveyances and the common law rules, discountenancing all manner of fraud, are designed to teach debtors the truth in respect to the rights of creditors, and to compel them to do justice. These rules and the policy of the statutes would entirely fail of their object, if a debtor could defeat preexistent creditors by converting his property into money and vesting the money in estates for his children.

Notwithstanding the impolicy of such a doctrine, if it has been settled by authoritative adjudications, I should feel myself bound by them, and leave it to the legislature to change the rule. I have not in my researches found that unbroken chain of decisions which should be regarded as settling the question, and therefore feel at liberty to establish the rule in conformity to the dictates of reason and justice.

But I am far from admitting, that I am without support by former adjudications. On the contrary, I think the principles heretofore recognised, in cases to which I shall briefly refer, fully sustain the doctrine now contended for.

The case of *Halbert &c. vs. Grant* is in point, or admits of so small a difference that it ought to be discarded. (See 4 *Mon.* 590.) In that case, the father conveyed his estate fraudulently to his sons. Afterwards being evicted by paramount title, he purchased in that title, but had the conveyance made to one of his sons to defeat creditors. The court subjected the title, thus conveyed to the son, and which the father never owned, to the payment of the father's debts. Now the only difference between that case and this, is, there the fa-

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ther once claimed the land before the successful claimant conveyed it to the son; here it does not appear that Doyle ever claimed the land before it was conveyed to his children. The difference, I think, amounts to nothing; for, by the recovery in the ejectment, it was judicially determined, that old Grant had no title. His only interest was a claim for improvements that he surrendered as the consideration for the conveyance to his son. Suppose the successful claimant had paid the money for the improvements and entered on the land: suppose he had thereafter conveyed the land to regain the money, would there have been any difference between that case and the present? None in principle. The failure to pay the money cannot change the principle, when a discharge of the liability to pay it is made the consideration of the conveyance. Such a discharge is equivalent to the payment and return of the money, and the parties by the arrangement saved the trouble of counting. The court do say that, "If the land had never before been possessed by the father, and conveyed fraudulently by him, and he then had become for the first time the purchaser thereof, with his money, and had directed it to be conveyed to one of his children, as it would, in that event, never have been subject to his debts, there would have been some ground for contending that it could not now be subjected." No more ground for it, I think, than there would be to subject the title of Doyle's children in this case to his debts, because he had disseized Lucas, and was in possession claiming the land at the time he procured the conveyances from him to the children. I cannot perceive any reason for divesting infant children or adults of a good title, which the father never owned, merely because the father set up claim to the land and got in possession, and acted fraudulently, upon the supposition that he was the owner. I see no propriety in staining the title of the children with the black frauds of the father, over which they had no control. I will not resort to such pretexts for subjecting the estate to the payment of the father's debts. They are irrelevant. I prefer enquiring directly as to the payment of the consideration, and if I find it was entirely paid

by the father, I am prepared to carry out the opinion of Lord Northington, in *Partridge vs. Gopp*, "that no man has such a power over his property as that he can dispose of it so as to defeat his creditors, unless for consideration." *Halbert &c. vs. Grant* points out the road to reach property when the fraudulent donee or grantee has made way with it.

I admit, that where a parent advances the consideration, and takes or procures a conveyance to his child, the property conveyed cannot be reached by a subsequent creditor, upon the principles of the common law. The reason is obvious, the consideration thus advanced could never have been a fund to which the subsequent creditor looked for the satisfaction of his demand, and therefore it is impossible that such creditor could have been cheated or defrauded by the transaction. But the English courts, in order to give the most beneficial operation to their statutes against fraudulent conveyances, have, where the grantor was indebted at the time, set aside the conveyance in behalf of subsequent as well as prior creditors. They have also denounced conveyances made, when the grantor was not indebted, but in contemplation of future indebtedness. I also concede that the weight of authority, in limiting the effect and operation of the statute, has confined it to alienations; and not permitted it to embrace purchases. As, therefore, Doyle never had the estates in question, and never conveyed them, there is nothing for the statutes against fraudulent conveyances to operate upon. The property is not subjected to the payment of Doyle's debts in virtue of those statutes, but upon a different principle; to wit: the iniquity of suffering the funds of the debtor to be diverted from the payment of subsisting debts, and gratuitously transferred to children. The case of *Crozier vs. Young*, 3 Mon. 157, shows that the statute of 13th Elizabeth, and our statute relative to fraudulent conveyances do not embrace the present case. But the concluding remarks of the court, in *Crozier vs. Young*, clearly shew, that Young was a subsequent, and not a preexistent creditor; and therefore, in the language of the court, not entitled to the protection of the common law against the

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Property purchased and paid for by a parent, and conveyed to his children, can not be reached by a subsequent creditor of the parent, by the rules of the common law. Nor are such purchases within the statutes against fraudulent conveyances.

But where one who is in debt purchases property and has the conveyance made to another, such grantee is but a trustee for the party who paid the consideration, & the property is liable for his debts, upon common law principles. [See the concurrent view of the C. J. page 586, and also of Judge N. post.] The case of a father intending, in that way, to advance his children should not constitute an exception to this general rule.— [Ch. Jus. and Judge N. contra, p. 586, and post.]

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effect of the fraudulent transaction. Sleeper and Alsop are situated so as to avail themselves of that protection, being preexistent creditors; and therefore have a right to say to Doyle and his children, "you shall not use the funds which ought to be appropriated to the payment of our debt for the purpose of securing estates to yourselves whilst I am unpaid."

There are other well settled principles of the law, which, when permitted to operate according to the reasons on which they are founded, will show that the lots conveyed by Lucas to Doyle's children, should be subjected to the payment of Doyle's debt to Sleeper and Alsop.

Where the purchase money is paid by one, with his money, and the estate is conveyed to another, the grantee is a trustee for the payer. This is not denied by Judge Nicholas, as a general proposition; but he, and the Chief Justice likewise, lays it down as an exception to the general rule, that where the father pays the purchase money, and takes the conveyance to a child, then the relation of blood destroys the resulting trust, and confirms the title to the child, as an advancement. Now, I admit that when the father's circumstances are such that he has something to spare, it is very proper to regard the estate conveyed at his instance to the child, and paid for by him, as an advancement. But when the father has nothing; when, if he would act honestly and pay his debts to the extent of his means, he is insolvent; when in truth he has nothing to advance which he ought to call his own, I cannot consecrate, as an advancement to the child, property paid for by the father. The general doctrine is, that a trust results in favor of the payer whose money is used; the exception is in favor of the child claiming to be advanced. But will the law make such exception when it perceives clearly, that the father was cheating creditors in making the advancement? Certainly not; for if it did, the law would countenance fraud. Even were it conceded, that the advancement of a child is to be favored in law, I should say, with Roberts, that "all the partialities of the law expire under its antipathy to fraud."



Whether a trust might not have resulted to Crozier, from the purchase by him of stock in the names of his children, in consequence of his indebtedness at the time, had the transaction been impeached by a preexistent creditor, seems not to have been considered by the court. So far as the court touches the question of a trust, it speaks of an express trust, or a secret trust, and says there was no evidence of either which would authorize the property to be reached under the twenty third section of the act of 1796, or by bill in chancery. All this is true, looking on Young in the light of a subsequent creditor. But if he had been a preexistent creditor, then the insolvency of Crozier, and his purchasing stock in the names of his children, would have been sufficient facts on which to justify the inference that the intent of the whole transaction was to secure the means of comfortable living in the family, at the expense of creditors; and that the father intended to repose upon the sympathy, and rely upon the means of his children, secured to them by his fraud, for support and aid. Under such facts, I should make the children trustees for creditors, as in the case of Halbert &c. vs. Grant. I would infer the existence of a secret trust between the father who would thus secure, and the children who would thus accept property. I could not doubt the correctness of the inference based upon such facts. The opinion of the world would constrain children who have been enriched by a parent, to prevent his coming to absolute want. There are associations connected with the name of father, which influence children to supply the wants of the parent—no matter how undeserving he may be. The fraudulent debtor is tempted to take advantage of these things, and therefore, is disposed to throw property and money into the hands of his children, knowing full well that such a fund will in some degree administer to his wants in time of need. Shall it be allowed? I cannot consent to it.

Why does a trust result in behalf of the payer whose money is used when the conveyance is made to another? There can be no good reason for it, unless it be found in the intrinsic justice of giving the estate to him whose

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money paid for it. Why should Doyle's children be regarded as trustees for his preexistent creditors? For a reason precisely of the same kind, to wit: the money which paid for the property ought, in justice, to have been paid to the creditors. Fraud changed its destination. It is the province of the chancellor to set aside the fraud, and give the avails of the money that destination which would have been given to the money, had honesty prevailed in the first instance. The identical dollars which Doyle paid to Lucas, cannot be reached, not only because they have no ear marks, but because they have passed into innocent hands. Still there is as much propriety in reaching the property paid for by those dollars as there was, in *Halbert &c. vs. Grant*, in holding the sons, the fraudulent grantees, to an account for the money received from the sales of the property conveyed to them, or for the value of the property where it was removed, destroyed, or put out of the way in any manner. All is to be done under the sanction of the principle, that he who comes to an estate which costs him nothing, shall be trustee for him who had, or ought to have had, the money which paid for it.

I am, however, of opinion that there is error in the decree so far as it directs the whole of the ground described in the first deed from Lucas to Doyle's children, to be sold, and if that should be insufficient to pay the debt; then the whole of the ground mentioned in the second deed to be sold. I think the direction should have been, to sell so much only as was sufficient to pay the debt. The chancellor should conform to the law regulating sales of land under execution. It is urged that, as these were portions of a town lot, it should be regarded as an exception, because the balance left might be so small as to be worthless. That I think is a matter which the court has nothing to do with. The law has wisely left it with bidders who are presumed to know the situation of the property they purchase, and if a division would destroy the value of the property, the officer will not get a bid for less than the whole, and if the debt can be paid with less than the whole, it will leave a part which must be presumed to be of some value.

The only possible injury which the debtor can sustain, will result from the possibility or probability, that there are persons who would bid for the whole lot or portion, who would not bid for part; and thus if the whole could be sold, more could be realized than if part only was sold. It is a sufficient answer to this, that the law has not provided for the case. In point of policy, I believe the law ought not to provide for it. In nine cases out of ten, property sells better in small parcels than in the lump. The law may proceed upon the idea of sacrifices at forced sales, and therefore, thought it best to sell as little of the property as possible. It is enough for me that the law has given no authority to our courts to decide on the divisibility of lands when offered for sale. Shall a chancellor undertake to say that the whole of a town lot must be sold together in all cases, or how many feet he will have sold in the different parcels? Will he have the cause burdened with depositions to prove how it can be sold to most advantage, and direct accordingly? The difficulties which suggest themselves, satisfy me that he ought only to direct a sale of so much as would pay the debt and charges, and leave it to the commissioner and bidders to ascertain the part necessary to raise the amount. For this error, I think the decree should be reversed.

**JUDGE NICHOLAS** :—The question presented, is, whether a purchase of land made by a father in the names of his infant children, can be subjected to the payment of his debts contracted prior to the purchase.

It is contended, that a court of equity has always possessed the power to subject such purchase to the satisfaction of creditors; and if not, then, that it has been conferred by our state legislation, subjecting *choses in action* to the payment of debts, and authorizing bills against debtors, for the discovery of their effects.

chase money—*aliter* where the conveyance is to, or the purchase in the names of, infant children. The implication from such purchase, is, that it was made for their advancement. This implication has never been destroyed in favor of a purchaser from the father. Neither should it be in favor of creditors, on the ground that the purchase was so made to defraud them. It is too well settled, to be now called in question, that the donee of money cannot be pursued by the creditors of the donor. A purchase in the names of infant children, is but a donation of the purchase money, and neither prior or subsequent creditors can subject property so purchased. The question has not been effected by the statutes subjecting *choses in action* and equitable interests, after a return of "no property" to a *fi. fa.*

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OPINION and  
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Judge Nicholas.

A conveyance to a stranger without consideration, or a purchase in his name, creates a resulting trust in favor of the grantor, or payer of the purchase money.

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Where lands are conveyed to a stranger without consideration, or purchased in his name, he paying no part of the purchase money, there will be a resulting trust in favor of the grantor, or payer of the purchase money. But this does not hold where the conveyance is from, or the purchase is made by, a father, in the name of an infant child, even though he enters and takes the profits during the child's minority. The reason of the difference is, because, between father and child, blood is a sufficient consideration to raise a use, and such conveyance, or purchase, will be deemed an advancement.—*1 Cruise*, 477 ; *Grey vs. Grey*, 1 *Cha. Ca.* 296 ; *Mumma vs. Mumma*, 2 *Vern.* 19 ; *Taylor vs. Taylor*, 1 *Atk.* 386.

The subsequent sale and conveyance by the father, of the estate to a *bona fide* purchaser, for a valuable consideration will not rebut or destroy this implication in favor of the child, or bring the case so far within the operation of the statute against fraudulent conveyances, as to protect the purchaser. *Lady George's case*, cited *Cro. Car.* 550 ; *Back vs. Andrews*, 2 *Vern.* 120 ; *Pre. in Chy.* 1 ; *Roberts' Frau. Con.* 463.

Nor has it ever yet been determined, that the statute avoids such transaction in favor of creditors, or that the estate so purchased could be subjected to their demands.

In *Stileman vs. Ashdown*, 2 *Atk.* 479, it was held by Lord Hardwicke, that the circumstance of the estate being taken jointly to the father and child, and the use of a moiety, with power of severance, thereby secured to the father, with a chance of survivorship, so far destroyed the implication in favor of the child, as to prevent his taking the whole by survivorship, and a moiety of the estate was by him decreed to be sold in satisfaction of a creditor. But this case rather tends to shew, that if the father had taken no part of the estate to himself, the decision would have been different. For if the estate would otherwise have been liable to creditors, there was no necessity for Lord Hardwicke's seizing hold of that circumstance, to repel the implication, there would have been in favor of the child, and which

would have rebutted any resulting trust in favor of the father.

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This deduction is much fortified by what fell from Lord King, in *Proctor vs. Warren*, Sel. Cha. Ca. Vin. Abr. title *Fraud*, q. a. 2, that he did not know it had ever been determined, that if a man, being indebted, has an estate originally conveyed to his children by way of provision for them, it should be subject to his debts.—Also by the case of *Fletcher vs. Sidley*, 2 Vern. 490, and 1 Eq. Ca. Abr. where A purchased a term in the name of a trustee, in trust for himself for life, and after his death, for a woman living with him as his wife; upon bill filed by creditors, after his death, it was held the residue of the term was not subject to his debts, because it never was in him. See *Ridler vs. Punter*, Cro. Eliz. 291, to the same effect. Mr. Roberts comes to the same conclusion as to the law on this subject; as did also this court in the case of *Crozier vs. Young*, 3 Mon. 158.

No authority has been met with, affirming that a purchase in the name of a child can be subjected to the payment of the father's debts; unless that of Mr. Mathews, in a recent work of merit, on the law of presumptive evidence, may be esteemed as such. He thinks that it can, though he admits no case has ever yet so determined. He argues, that, as a general rule, where a man purchases an estate in the name of another, he is entitled to it by way of resulting trust, and that this is not the case where the purchase is in the name of a child, only because of the repellant presumption, that it was made by way of advancement, and that where creditors are to be affected, such presumption should not be allowed to prevail. This argument forgets, that the whole trust in favor of the payer of the purchase money, is itself the creature of a mere presumption, which, like all others, can only stand so long as there is none other as strong or stronger against it; and therefore, when it is admitted, as all the authorities agree it must be, that the presumption in favor of the child, rationally as well as legally, outweighs the other, there is, in point of fact, no presumption whatever in favor of the father, and a court of equity has just as much right to make it, as it has to

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manufacture any other fact, and no more. If a court of equity holds such power over facts, or, which is the same, over the presumption of them, why has it not been made to operate in favor of, and for the protection of, *bona fide* purchasers from the father? A much more potent and beneficial effect, has always been given to the statutes against fraudulent conveyances, in the protection of purchasers, than of creditors. Yet it is admitted even by Mr. Mathews himself, and all the books shew it, that a purchaser cannot be protected by any such arbitrary destruction of presumptions.

It will not do to respond, that creditors have an existing interest in all the property and effects of a debtor, at the time he makes the purchase in the name of his child, which may be thereby prejudiced, whereas, the subsequent purchaser has no such interest. Such reasoning would go to sustain all voluntary conveyances against subsequent purchasers. The statute avoids only such conveyances as are made with intent to deceive or defraud purchasers. Now it may well be, that a voluntary conveyance was made with no such intent; yet, in order to give full effect to the statute, the courts have held that the subsequent sale, though a matter *ex post facto* merely, gives character to the transaction *ab origine*, and furnishes, in protection of the purchaser, uncontrollable evidence of an original intent to deceive. After the indulgence of such latitude of construction and presumption, to protect purchasers against voluntary conveyances, why have not the courts for their protection against purchases by parents in the names of children, exercised the power of destroying the presumption in favor of the latter, if they possess any such power? The failure to exercise it, must be taken as conclusive of its nonexistence.

This idea of a resulting trust in favor of the father for the benefit of creditors, is susceptible of another answer, by what fell from this court in the case of *Crozier vs. Young*, 3 Mon. 159. In that case, creditors were seeking, by bill in equity, to subject stock purchased by an insolvent father in the name of his children. In ascertaining whether the case came within the act of 1796,

which subjects estates of every kind held in trust, to the debts of those for whose benefit they are holden, the court said: "under this provision, if a debtor should take a conveyance originally to a third person, in trust for himself, the thing so conveyed would be liable to his debts. If the trust, in such case, be expressed on the face of the deed, the thing so conveyed would be subject to be taken and sold under execution; and if the trust be a secret one, and not expressed in the conveyance, a court of equity might interpose to subject it to the payment of debts, &c. But, in this case, the subscription of the stock does not purport to be made in trust for Crozier, nor is there any proof of a secret trust to that effect. The stock, therefore, cannot be liable to pay Crozier's debts, &c. And it was held not to come within the act of 1820, because, that only subjects *chooses in action belonging* to the debtor and equitable interests to which he may be *entitled*, and the stock never did belong to Crozier, and he had no title to it in law or equity."

Another ground on which Mr. Mathews relies, is, that a voluntary donation of money made by one indebted, is fraudulent under the statute, and will be pursued by a court of chancery, into the hands of the donee, and so, *pari ratione*, where the money is not directly given, but is bestowed through means of a purchase in the name of the child, it should be pursued into the estate purchased, in behalf of a creditor. In support of his proposition, that money may be so followed into the hands of the donee, he relies upon the observations on *Fletcher vs. Sidley*, made by Lord Hardwicke, in *Monk vs. Peacock*, 1 Vez. 127, and the decision of Lord Northington, in *Partridge vs. Gepp*, Amb. 596.

In the argument of *Fletcher vs. Sidley*, it was said by counsel, that the remainder of the term could not be assets for creditors of the purchaser, because the estate never was in him; that, as he might have given the money to the defendant, so he might purchase with it for her benefit; that it was a new pretence, to say a man might make a purchase fraudulently; that he could not alien in fraud of creditors, but as to purchasing for another, he might do it, or let it alone. And to that opin-

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ion, says the book, the Lord Keeper inclined. When this case was cited before Lord Hardwicke, in *Monk vs. Peacock*, he said it was only the inclination of the court upon argument of counsel, and it would be dangerous to allow the arguments that are there. To which of the arguments he had reference as dangerous, it is difficult to conjecture; for, as has been before shewn, he gave countenance to the result of the whole by his decision in *Stileman vs. Ashdown*. But it is very certain, he could have had no reference to that which assumes the right to give money, for his own determination in that very case of *Monk vs. Peacock*, is a strong authority against the right of the chauncellor to pursue money in the hands of a donee.

That case was this: A made his will, appointing B his executor and residuary legatee, and by deed of same day, vests four thousand pounds in B, to pay an annuity to A for life, and by both instruments directs one thousand pounds apiece to be paid to C and D. It was held to be a voluntary and *testamentary* act, and void against creditors within the statute, 13th Elizabeth. And the one thousand pounds apiece to C and D decreed to be assets. In delivering his opinion upon the case, he held this language: "Though money has no ear mark, yet, if in trust, it is another matter; for though it be not the specific four thousand pounds that was paid, it is the profits thereof. Monk being both executor and contractor in the deed, and both instruments being done at the same instant, it speaks the whole to be a testamentary act. Wherever a court of equity finds such a turn given to a transaction, to defeat creditors, reserving the benefit of it to the person himself, the court will be very nice to find out a distinction for creditors. *It is true indeed, a man may give money in his lifetime as he pleases, without creditors calling to an account, or having it refunded*; but then he must absolutely part with the benefit of it during his life, otherwise a court of equity will enquire very strictly into it." If such explicit language from so eminent a source, needed support, it is to be found in a case reported by *Viner*, title *Fraud*, pl. 27—where a man, being much indebted, gave six hundred pounds for the



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benefit of his younger children, six hours before his death: such gift was held not to be fraudulent against creditors. The subsequent and contrary determination of Lord Northington, in *Partridge vs. Gopp*, without noticing either of these cases, is either entitled to no weight as an authority, or only in a case similarly circumstanced. It was a bill against an executor for a large legacy. After a decree against him to account, and pending the suit, he gave his four daughters five hundred pounds each, and as to two of them, on their wedding days, as marriage portions, in pursuance of a previous promise. These two, it was held, had a sufficient consideration to uphold the gifts, and they were irrecoverable; but the single daughters were decreed to refund to the creditor what had been given to them—his Lordship thinking the gifts to them fraudulent within the 13th *Elizabeth*. The correctness of this decision was challenged at the bar, at the time of its delivery, and Mr. Roberts does not hesitate to disapprove it. It is, however, an authority in support of the decision of this court in *Crozier vs. Young*, that the money cannot be recovered back from one who pays value for it, though so far as concerned the insolvent purchaser, it was a fraudulent donation to his child.

If it be true, as declared by Lord Hardwicke, that a man may give away his money as he pleases, without creditors calling to an account, or having it refunded, there can be no sound reason, of either law or policy, for enabling a creditor to reach donated money when the donation is made through a purchase of real estate in the name of the donee. Such purchase, is in effect, nothing more than a mere donation of the purchase money.

It would seem then, that in these cases of purchases by a father, in the name of his children, the points ruled in *Crozier vs. Young*—that the money cannot be reached in the hands of the vendor, and that there is no resulting trust in the property in favor of the father, for the benefit of his creditors—are not impugnable, but on the contrary, are well sustained by authority.

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But—strange to say—the case of *Crozier vs. Young*, is seriously relied on by counsel, as an authority in favor of the relief sought here. This is done on the ground of an alleged implication, deducible from the case, that if the creditors there had been prior, instead of subsequent, there was some undivulged principle of the common law, which would have afforded them relief. When the court had decided that the money paid by Crozier, could not be got at, and that he had no interest whatever in the stock, direct or resulting, legal or equitable, they had decided the whole case; and the *ex gratia* enquiry as to the rights of the creditors, under the principles of the common law, was probably only indulged in, because of the easy answer, to such pretence: that is, that the common law did not protect subsequent creditors against prior voluntary conveyances. The cases of *Buford vs. Buford*, 1 Bibb, 305, *Winebrinner vs. Weinger*, 3 Mon. 36, and *Cosby vs. Ross*, 3 J. J. Mar. 291, are full and perfect authorities to shew, that a court of equity cannot, in favor of creditors, create a fund not otherwise liable by law for payment of debts, and it would be doing great injustice to the court to deduce by mere implication from *Crozier vs. Young*, the intimation of any opinion to the contrary. In the subsequent case of *Halbert vs. Grant*, 4 Mon. 590, there is a much more explicit intimation, that creditors cannot reach land purchased by a father in the name of his child.

Effect of the statutes subjecting a debtor's choses in action and equitable interests, considered.

It remains to be determined whether any change in the law on this subject has been produced by the statutory provisions of this State, subjecting choses in action and equitable interests, and which authorize a creditor to file a bill for the discovery of all choses in action, and other property or estate, real, personal or mixed, in which the debtor may have any interest. That so much thereof as subjects choses in action and equitable interests has produced no change, has already been decided in *Crozier vs. Young*, and it is very clear, that no alteration can have been made by so much as authorizes the bill of discovery. This last has created no new subject for the payment of debts, but merely furnishes a new remedy, or mode of getting at those things already made liable.

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This is strictly true, even as it regards money in the possession of the debtor. For upon full consideration, it was expressly determined, *Turner vs. Fendall*, 1 Cran. 133, that money is liable to, and may be taken by an officer, to satisfy an execution. It will not do to give the act such interpretation or effect, as will enable a creditor to pursue money which was once his debtor's, into whose-soever hands it may have come. The better, and indeed what seems to be the only practical construction of the act, is, to restrict it to such money as he had at the filing of the bill, and that it would be improper to attempt to trace it, even after bill filed, farther than into the hands of a voluntary donee. Considerations of public convenience would forbid the giving to a creditor a specific lien on even the money which the debtor had at the filing of the bill, or might afterwards acquire pending the suit, so as to prevent his parting with it, *bona fide*, for a valuable consideration. The coercive efficacy of the bill of discovery furnished by the statute, is no greater, if so great, as that afforded by the *ca. sa*. During the existence of that writ, purchases made in the names of children, were not deemed void, or in trust for the father or his creditors because that if he had waited till the writ was used against him, the means employed in making the purchase would have been taken away. Nor can it now be deduced as a consequence of our act, that the children cannot therefore hold such purchase against creditors. Indeed, all the reasons used in *Crozier vs. Young*, to shew that case did not fall within the statute against fraudulent conveyances, are still pertinent, and apply with equal force to this case.

The lot in question never was held by the father. He had at no time any property in it, either legal or equitable, and, of course, none could have passed from him to the children. By the purchase and conveyance, they became vested with the legal right and title to the lot, and took it not from him, but from the vendor. The purchase money indeed was his; but it is not the money paid which is sought by the creditor to be made subject to his debt, nor could it, if such were the object, be made liable to his debt; not only because money has no

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ear mark, but because the money has passed into the hands of the vendor, who paid value for it, and cannot therefore be deprived of it. But it is the lot, and not the money, which the creditor is pursuing, and that never was his, or conveyed by him to his children.

It is conceded to be a gross imperfection in the law, if an insolvent debtor holding a large estate, can convert it into money, and with the money, purchase other property in the names of his children, to the exclusion of his creditors. But the evil is no greater, nor the fraud one whit more enormous, than it is to permit him to turn his estate into money, and then give the money to his children, without any power on the part of the creditors to compel the children to account for it. The injury to the creditor is precisely the same in the one way as the other, and equal facility is afforded the debtor to defraud his creditors for the sake of his children. We, therefore, gain no ground in the prevention of fraud—we subserve the substantial interests of creditors nothing, by denouncing and prohibiting the one mode, whilst we allow the other. Besides the absence of all motive on the score of general policy, to make any distinction between them, they do in truth, in a legal point of view, stand upon the precise same footing. Money, as it has been shewn, is like all other property, subject to levy, and liable to be taken under execution. As a general rule, all voluntary alienations of property subject to execution are fraudulent and void as to creditors, and a court of chancery will assist the creditor in getting the property so alienated. Yet a court of chancery will not make the voluntary donee of money pay it over, or account for it, to the creditor of the donor. This is, in the language of Roberts, because the character of the thing presents a *natural boundary* to the efforts of the law in pursuing the redress of creditors against voluntary alienations. The court of chancery acts merely as the handmaid of the law, assisting the creditor to get at such things as the creditor obtains a lien upon by virtue of his execution. Hence the rule which requires the creditor to issue an execution on his judgment, before the chancellor will assist him. But as the execution gives no

lien upon money, either in the hands of the debtor or his donee, and as the chancellor has no power of creating a fund for the satisfaction of the creditor, beyond his lien, or of subjecting the money, if it had remained in the hands of the donor, he has no right to subject it in the hands of the donee. If, then, he has no power of subjecting the money in the hands of the donee, neither can he have the power of subjecting property which the donee may have purchased with the money. It is true he does pursue money into property with which it has been bought, in cases of resulting trust, but that is because of the trust. As between the donor and donee of money, there is no trust. If there were, or if it could be made out for the sake of creditors, then, since our statute subjecting *choses in action* by bill in equity, he might, in all cases, subject the money itself in the hands of the donee, or make him account for it, for the benefit of creditors. Nor would it matter as to the amount; all voluntary donations are fraudulent as to creditors, whether large or small. If then the chancellor could neither subject the money in the hands of the donee, nor its avails when converted into property by him, why should he subject the property when bought by the donor for and in the name of the donee? No legal reason or principle of policy can be perceived for the distinction.

It is wholly impracticable to deduce a power in the chancellor to subject property purchased in the names of a debtor's children, by any legal process of reasoning, without declaring all voluntary donations of money fraudulent as to creditors, and making the donee surrender the money or account for it. But this is what cannot now be done. It would require the overturning of too many authorities.

The only other mode suggested, is that of creating an implied trust in favor of the father, for the sake of creditors. This, it has been already shewn, cannot be done. The argument used for that purpose is not shaken, by the idea that proof of an actual fraudulent intent on the part of the father, in making the purchase, should destroy the implication of an intended advance

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ment of the child. It is conceded, that a father ought not to advance his child in fraud of his creditors ; but it is not perceived how an intention to defraud his creditors, does or can be made to destroy the implication in favor of the advancement. That circumstance is naturally calculated to fortify rather than destroy such implication. The question is one of intention merely on the part of the father. In the general, when he makes a purchase in the name of his child, it is inferred to be by way of advancement to the child, and not for his own benefit. When you superadd the additional motive of defrauding his creditors, you exclude all room for inference that the purchase was made for his own benefit, for if made for his own benefit, then it becomes subject to his debts, which thwarts the very intent with which the purchase was made—that is, the defrauding of his creditors.—The double intent, of advancing the child and defrauding his creditors, on the contrary, may well exist, and no doubt often does, when such purchases are made.

According to the doctrine of *Buford vs. Buford*, 1 *Bibb*, and *Croby vs. Ross*, 3 *J. J. Mar.* if, prior to our acts subjecting trust estates, equitable interests and *choses in action*, a debtor had created an actual resulting trust, by purchasing property in the name of a stranger, though the property was thereby beneficially his, and though he might become insolvent, and have nothing else with which to pay his creditors, yet a court of chancery could not have subjected it to the payment of even his prior debts, because it was not liable at law, and because the court has no power to create a fund for the benefit of creditors. Upon what principle then can the chancellor subject the property here, where the debtor has no beneficial interest, where there is no resulting trust in his favor ? The demands of creditors are as urgent, their equitable claim to relief as strong, if not stronger, in the case supposed than in this. What could it have availed, prior to those acts, to destroy the implication in favor of an advancement, in a case like this, because of the intent to defraud creditors, when you merely produce thereby a resulting trust in favor of the father, and when such trust itself could not have been made

liable to the payment of debts? According to the doctrine of the cases referred to, the implication never could, or would have been so destroyed. The general principles of law are the same now, that they were prior to those acts; and if prior thereto, they could not so destroy the implication, neither can they be made to do it now.

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Nothing can be gained to the argument in favor of subjecting the property, from any idea of actual fraud on the part of the infants, or agreement by them to hold the property in trust for the father. For ought that we know, and according to what we should presume, they may be of such tender years, that they were incapable of being participants in an actual fraud.

The case of *Halbert vs. Grant* is relied upon as authority to shew the power of the chancellor to reach this property in behalf of the creditors. It is difficult to feel any weight in a case as an authority, when the judges who decide it, do not pretend to act upon the principle which is supposed to be deducible from it, but, on the contrary, expressly repudiate any such idea.

The cases of *Pole vs. Pole*, 1 *Vez.* 76, and *Lloyd vs. Read*, 1 *Pr. Wms.* 607, which are also relied on, prove nothing but the uncontested point that the implication in favor of an advancement of the child, may be rebutted. They do not even conduce to shew that the fact of the purchase having been made to defraud creditors, will be sufficient to rebut it.

If the view of the subject before us, here taken, be incorrect, and the fact that the purchase was made with the intent to defraud creditors, would subject the property to their demands, it is not perceived how the actual fraud is to be made out here. It is admitted not to arise from the proof, but is supposed to be deducible from the character of the answer of the infants. I cannot give my assent to the doctrine, which will forfeit the estate of an infant, on account of the peculiar character of the answer put in for him by his guardian *ad litem*. If the guardian *ad litem* had contented himself with his denial of the allegations of the bill, it is conceded the creditors could not, on the case as made out, have subjected the property; but, because he thought

Infants should not be prejudiced by any allegations contained in their answers, put in by guardian *ad litem*; nor should any effect be given to such allegations by their agreement to have a decision on the merits here. See a different view by the *Ch. Jus.* p. 541.

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proper to add, that the property was purchased with the money of the infants, and failed to prove it, the property must, as is contended, be subjected. Neither the justice or legality of such a conclusion can be admitted. The allegation amounts to nothing more than the law would have presumed without it. It was not necessary for the infants to have alleged affirmatively, that the property was purchased by way of advancement. That is a fact deducible from the transaction of which they are entitled to the benefit, without any allegation.—The answer of an infant should be allowed to assume any shape, which the case as made out on final hearing may require for the protection of his interests. If the allegation of affirmative matter is to have the effect of prejudicing his rights, the guardian *ad litem* ought not to be allowed to make it. Neither is it perceived how the infants are to reap any additional prejudice from the circumstance of their having asked us, in the prosecution of their writ of error, to dispose of the case, as it stood at the hearing in the circuit court.

Real estate to be sold to satisfy a decree, or under execution should be offered entire, whenever, in consequence of the buildings upon it, or from any other cause, a division would produce a sacrifice.—The other two Judges of a different opinion. Pages 542, 550.

If it should turn out, as it has been suggested to us, that the property is insusceptible of division, by reason of its being built upon, I think it every way legal and proper, that it should be sold altogether. I have no idea that it is either legal or proper, even under an execution, to make sacrifice of property by selling a piece of a house. A reasonable construction must be given to every law. We are not to presume the legislature meant, that less than the whole of a piece of property should be sold where it was insusceptible of division, and where the sale of a part would produce inevitable sacrifice.



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## Wash vs. McBrayer.

TRAVERSE.

[Mr. Richardson for Plaintiff : Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR ANDERSON COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.—  
Judge Nicholas dissenting.

November 11.

DURING the pendency of a traverse which McBrayer had taken to an inquisition against him, on a warrant for forcible entry and detainer, Wash, the traversee, sold and conveyed to his sons, the land in controversy, and which was, at the date of the conveyance, in the adversary possession of the traversor.

Statement of the case.

On the hearing of the traverse, the circuit court decided, that the champerty act of 1824, applied to the case, and that, therefore, Wash could not recover, by suit, the possession of the land.

Decision of the circuit court, &amp; question to be determined here

Whether or not the circuit court erred in that opinion, is the only question which this court will now consider.

The first section of the act of 1824, amending "the champerty law" (*session acts, page 444*) declares, that a contract for selling land whilst in the adversary possession of a stranger to the contract, shall be void, and that no right of action shall arise, from such a contract, to either party to it.

Sales of land in the adverse possession of a stranger to the contract, are void, and no right of action arises to either party, from such a contract. Act of '24; §1.

The second section invalidates contracts for "carrying on" suits upon pretended titles to land, in consideration of a part of the land, and declares that any claim or title, which was the subject of such prohibited contract, should be forfeited, and that neither party should have any cause of action on any such pretended title.

Contracts for carrying on land suits for part of the land are void; the title made the subject of such contract is forfeited — and neither party can have any action upon it. *Ib.* §2

The third section provides, that any person, who was in the adversary possession of the land at the date of any sale or contract prohibited by the first and second sec-

A party in possession of land, at the time of

any contract in relation thereto, in violation of the first or second section, (*supra*) may plead such contract in bar of any suit founded thereon;—and may, by bill of discovery, compel a disclosure of the true date and other circumstances of the contract. Sec. 3.

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tions, may "plead the *sale or purchase* of any pretended right or title in violation of the first section, or any contract or agreement made in violation of the second section, in bar of any suit, or *claim founded thereon*." This latter section does not extend or alter the import or operation of the first section. It only enables the occupant to plead the contract of *sale* (prohibited by the first section) in bar of any suit founded *thereon*—that is, on *such illegal contract*. It does not apply to a suit brought by the vendor on *his own preexisting title, which had not been invalidated or affected by the void contract of sale made in violation of the first section*.

The third section, it is true, authorizes a defendant in possession, when sued on a title, or a claim founded on a contract prohibited by either the first or second section, to file a bill of discovery; and hence it is argued, that the third section should be construed as intending to allow a defendant to plead a sale in violation of the first section, in bar of a suit upon the title of the vendor; because, when the suit is brought on the void title of the purchaser, his deed will shew every fact that a discovery on oath could expose. This argument, though plausible, is far from being conclusive. The true date of the contract is the decisive test of its legality, or illegality; and, to evade the statute, the deed could be easily antedated, so as to appear to have been executed prior to the adverse occupancy. When such an artifice is suspected, the defendant may compel the parties to disclose, on oath, the true date; and, in some other respects, a defendant may be benefitted by the oath of the plaintiff, even though the third section applies only to the prohibited *sale or contract*.

Every conveyance, or contract for the sale of land in the adverse possession of a stranger to the contract, is void, (by the *champerly act of '24*) and no suit can be maintained upon a title acquired under

It is but reasonable to presume, that the first section is as comprehensive as the legislature intended that it should be. It would not be proper, or consistent, therefore, to give such an interpretation to the third section, enacted only to enforce the first and second, as would extend the effect of those two denunciatory sections, unless such an incongruous interpretation could not be avoided without a palpable perversion of the language of the third section. And it appears to us, that, even

according to its true grammatical import, the third section is not inconsistent with the first section, and does not invalidate the *title of the vendor*; it does not, we think, apply to *his* right at all, but only to the title of his vendee. As already suggested, it applies to the "*contract*;" but even if it apply to the title, or to a suit founded on *the title*, which was sold in violation of the first section, it should be understood to mean the title claimed, or asserted, by the purchaser, only. It would then mean only that the defendant may plead the prohibited sale in bar of a suit founded on the *purchased title*, which is void; that is, *the title attempted to be derived from the illegal contract*. Any other construction, would pervert the act of 1824, into an engine of injustice and oppression, as a single case will exemplify:—A, living in Fayette, explores a tract of land, of which he is the only owner, in Livingston county, and ascertains that it is unoccupied. He returns home, and, in perfect good faith, mortgages the land to B, to secure a debt which he owes him. Two months afterwards, he pays the debt, and the lien is released; but, in the mean time, only one day prior to the date of the mortgage, an intruder, without any pretence of title, settled on the land, and boldly claims to hold it adversely to the title of A. Must A give up the land to the trespasser? He must do so, if the third section of the act of 1824, apply to *him*. The legislature never could have intended such injustice and absurdity. Such a consequence is not within the motives or policy of the act of 1824.

But it may be asked, why the second section denounces a forfeiture of the claim of both parties to any contract which it inhibits, unless a similar denunciation was intended as to both parties to contracts forbidden by the first section. Two answers may be given to this question. *First*: The second section applies to both parties expressly and undeniably. The first as clearly applies to the purchaser only; and *ita lex scripta* should satisfy the querist. *Second*: But, if it be necessary to find a motive for the discrimination, a sufficient one is quite obvious. Such contracts as those denounced by the second section are signally odious and pestiferous. They

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such circumstances. But the title of the vendor is not forfeited by such vain attempt to transfer it; nor is his right of action, upon his preexisting title, thereby destroyed. [See the Dissent of Judge Nicholas, page 569.]

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generate litigation, and encourage injustice and unprincipled speculation. The aim of both parties is the same. They both know that the title which is the subject of their champertous traffic, is questioned and is doubtful, perhaps desperate—desperate means may be necessary to sustain it. The temptation to make such contracts is strong and cannot be easily overcome. And, therefore, it was deemed necessary to subject to *forfeiture* the claim of both parties, who, for purposes of speculation and pestilent litigation, conspired to violate a salutary law.

But the *bona fide* sale of a title is of a far different character ; and the policy of prohibiting it at all has been doubted, as the history of legislation on that subject will clearly demonstrate. And to invalidate the sale, is as much as policy could require, or justify. The parties only lose a *bargain*, good or bad, to the one or the other ; and, as they may both act in perfect good faith, without a suspicion that they are violating any law, a forfeiture of their bargain is as severe a penalty as can be necessary or proper.

The second section declares a forfeiture. The first only says that the contract shall be void. Why this difference in the phraseology ? Because the legislature intended, that the title should be forfeited in *the one* case, and only intended that, in the other, the *contract* should be *void*.

The statute has declared only, that *the title of the purchaser or alienee* should be invalid in consequence of a sale or alienation of land contrary to the first section.

We cannot give such an interpretation to the act of 1824, as to deprive the *bona fide* vendor of his right, or as to withhold from *him* all remedy for enforcing that right against a stranger who may have no title whatever to the land.

It does not appear, that Wash is prosecuting this suit for the benefit of his alienees, or that it is a suit in his name for their exclusive benefit ; and it is not necessary to intimate what might have been the effect of proof that this is a suit for the use of the alienees, and not for the use of Wash himself.

Wherefore, it is the opinion of a majority of the court, that Wash did not divest himself of his preexistent title by his abortive attempt to transfer it to others, or lose his right to maintain a suit on his own subsisting legal title.

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Wherefore, the judgment is reversed, and the cause remanded for a new trial.

JUDGE NICHOLAS, dissenting from the construction given to the statute in question, and the decision of the majority of the Court, read the following Opinion :—

The first section of the champerty act of 1824, declares, that no person shall sell or purchase by deed, bond, or executory contract, any pretended title to land, whilst in the adversary possession of another, makes void every such deed, bond or contract, and says that no right of action shall accrue thereunder.

DISSENT, by  
Judge Nicholas.

The second section makes it unlawful to contract to recover land adversely possessed, in consideration to have part or profit thereof ; forfeits the title of the parties to such contract, and all right to maintain any suit on such *pretended title*.

The third section authorizes the occupant to "shew or plead the sale or purchase of any pretended title, in violation of the first section, or any contract in violation of the second section, in bar of any suit founded *thereon* : " and authorizes " the defendant in *any such suit*, to bring the parties to the sale or purchase mentioned in the first section, or to a contract in violation of the second section, before the court, and compel a discovery of any such *sale or contract*."

My understanding of the import of the third section, is, that it was framed for the double purpose of enabling the occupant to defend himself, by shewing that the plaintiff had sold the land in contest, and the better to enable him to make out that defence, or the one afforded him by the second section, of authorizing him to compel a discovery of the sale or champertous contract. It is, however, contended, that it was not intended to make a sale of the title, within the meaning of the first section, a bar to a suit on that title, but merely a bar to a suit in

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the name of the vendee, leaving unimpaired the right to prosecute a suit in the name of the vendor. The solution of the difficulty depends upon the question, whether the word *thereon*, in the third section, refers to the title sold, or to the contract of sale.

The more material words, upon which the true construction depends, when placed in juxta-position, read thus—"may shew the sale, or purchase, of any title, in bar of any suit founded thereon." Founded on what? The common and casual reader would answer, "on the title." The rules of grammar say the same. The word title is the next antecedent, and by all rules of construction, must be taken to be the thing referred to, unless the otherwise plain sense and meaning is thereby marred. Here you do not mar the sense by sticking to the next antecedent. On the contrary, if you skip the word title, and make the reference apply to sale or purchase, you do mar the sense and the only substantial meaning to be extracted from the entire section. To a legal mind, no words could convey less sense or meaning, than an authority to the defendant to shew a sale or purchase in bar of a suit founded on the sale or purchase. It would be equivalent to a legislative declaration, after pronouncing certain contracts illegal and void, that a defendant, when sued upon such contract, might shew the contract, in bar of the action. Nothing could be more idle or unmeaning.

The reference of the word *thereon*, with regard to the second section, is obviously and necessarily to the *title*, about which the contract for carrying on any suit, was to be made. It would be absurd in the extreme to suppose the legislature meant to authorize the occupant to defend himself against a suit founded on the champertous contract. Such contract could never be the basis of a suit against him. The reference with regard to the second, being so clearly to the title, and not to the contract, it lies not within the powers of construction, to make the reference to the first section, apply to the contract, and not to the title. The only mention of the title in the third section, is where it is spoken of in connection with matters embraced in the first section, and it

is there we have to go in order to find what it is the word *thereon* refers to, in regard to matters embraced in the second section. When the reference is thus to the same set of words as to both sections, how is it possible so to sever and disconnect the meaning of the word *thereon*, as to give it one sense with regard to the first, and another with regard to the second. To find what is meant with regard to the second section, we have to ascertain what is said with regard to the first. By this process, we ascertain that it was the title, and not the champertous contract, upon which the act contemplates the suit against the occupant was to be founded. How is it possible, then, to suppose that the legislature did not also mean the same, with regard to the first section? The word *title* stands in more immediate connection with what is said of the first section, and does not give signification thereto, yet it gives signification to what is said of the second section, though it stands disconnected therefrom. Fair construction surely never produced such a result.

In the second section, it is said, the parties to the champertous contract shall forfeit "all right to maintain any suit upon such pretended title." When language so very similar is used in the next section, it is difficult to believe it was not used in the same sense.

How unapt and inappropriate is the language used to convey the idea contended for! We do not say that a suit for land against an adversary occupant is founded on a sale or purchase, but upon the title bought or sold.

It is a sound rule of construction, to give some effect to every word of an act, if it be practicable to do so. Much rather, therefore, should effect of some sort be given to an entire section. This rule must be totally disregarded, if the word *thereon* is made, in its application to cases under the first section, to apply merely to the conveyance, and not to the title. For that will render the whole, or nearly the whole, of the entire third section perfectly idle and inoperative. It gives no additional efficacy whatever to the second section; for that, in legislative contemplation, must have been as fully sufficient of itself to bar any suit on the title, without the

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aid of the third section, as it is with it. On the contrary, the first section standing alone would merely avoid the conveyance or contract, leaving the title in the grantor or vendor, still to be enforced in his name; and by permitting the third section to refer to the title, and constitute a bar to a suit founded on the title, then effect is given to the third section, and it becomes operative to a substantial purpose. But if its reference is to the conveyance alone, and not to the title, it is inoperative. It surely could answer no purpose for the legislature solemnly to declare, that the occupant might protect himself against a recovery under the conveyance, when it had already said, in the first section, that the conveyance should be void, and pass no title. Besides, how absurd to authorize him to shew *that* in his defence, which his adversary, if he succeeded at all, would be compelled to shew for him. If the plaintiff claims under such a conveyance, he will necessarily have to shew it, in order to recover. What need then to say the defendant may shew it in his defence? If such were the meaning of the legislature, why enable the defendant to compel a discovery on oath, "of any such sale or contract?" The word sale has exclusive application to the first section. Why should he seek a discovery of the sale, when its whole effect after discovery, would be nothing more than the manifestation of a fact, which it would be indispensable for the vendee himself to prove, in order to effect a recovery? It cannot fairly be presumed of the legislature, that it would authorize a discovery for the purpose of enabling the occupant to shew that he was in possession of the land at the time of sale. That is a matter, about which he must be presumed at all times to possess the most abundant means of proof, without the necessity of a discovery from his adversary. Neither can it be presumed that the discovery was authorized for the purpose of proving the true date of the sale, in order to prevent the post-dating of a deed merely. That is a circumstance too trivial in itself—an evasion too easy of detection in other modes, to suppose the legislature would devote an entire section to it, and especially one of the texture of this. Besides, if that



were the sole object of the discovery, it has no application, and would have no bearing whatever upon a champertous contract. This construction would restrict the sales to be discovered, to those that are evidenced by deed merely, whereas the sale referred to, and as spoken of in the first section, is by any mode, whether by deed or executory contract.

The construction contended for, does, therefore, strip the entire third section of all practical meaning and effect. It literally subserves no substantial purpose whatever. We cannot thus tamper with the canons of construction, in order to obviate the evils likely to flow from a supposed lack of sound policy in a legislative enactment. If the rule as prescribed be too rigid and extensive in its operation, it is for the legislature to relax and curtail it. We make rather a free use of the powers of construction, when we curtail it—when we make a plain legislative enactment say literally nothing. I believe the legislature understood the import of the language used, and intended what it does literally import. It was meant to effect a thorough suppression of the trafficking in pretended titles to land in adversary possession. The evil was one under which the country had long suffered. They intended to cut it up by the roots. The mere avoiding the sale and conveyance was deemed not a sufficient protection against the traffic. It was thought that champertors would still buy, and carry on suits in the names of their vendors, and trust to their honor for making a conveyance after the recovery was had. It was to prevent this, and to afford the discovery, as to cases under both the first and second sections, that the third was added. The remedy may, and probably will, go farther than the evil intended to be guarded against. But if not permitted to operate at all, it will leave much of the evil unguarded against. As between the two effects, I do not conceive we have any election. But it is believed that a sale of land would rarely occur without the parties being apprized of its being in adverse possession. As to the case of a mortgage, it is believed not to be such a sale as was contemplated by the third section. It speaks of sales and pur-

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chases, not of conveyances. And as property in adverse possession is allowed to be sold under execution, it would do no violence to the general principles of our code to permit the mortgagee to foreclose and sell. Where a mortgage was resorted to as a mere device for evasion, it would of course be treated as a sale within the act.

If the construction contended for by me, were adopted by the court, it would remain to be determined, whether the legislature had the power of suppressing the evil in the manner that I suppose it contemplated. I am inclined to think it had such power, and that this case does not fall within the principles insisted on by me, in the case of *Gaines vs. Buford*, [ante, 502.] But as a majority of the court has given a different construction to the act, a discussion of that question would be inappropriate and unprofitable. Not being able to concur in the construction adopted by a majority of the court, and the question being one of much importance, I felt it my duty to give the reasons for my dissent.

DETINUE.

### *Simrall's Administrator vs. Graham.*

[Mr. Richardson and Mr. Haggin for Plaintiff: Mr. Monroe for Defendant.]

FROM THE CIRCUIT COURT FOR SHELBY COUNTY.

November 11.

Judge UNDERWOOD delivered the Opinion of the Court.

The consent of an executor in Va. that a slave should vest in the legatee, may be inferred from his removal, and bringing the slave with him, to this state. Chattels which a decedent had only a life state in, do not go to the adm'r.

WE think, the negro Jenny, under the will of James Simrall, passed immediately to Alexander Simrall, the plaintiff's intestate. Whether he had a right, under the laws of Virginia, where the will was admitted to record, where James Simrall died, and where the property was then situated, to take possession of the slave without the assent of the executors, need not be decided.

Mrs. Simrall, the executrix and widow of the testator, according to the testimony, claimed Jenny for life. The devisee, Alexander Simrall, died in 1802. The will

was admitted to record in September, 1798. Mrs. Simrall moved to Kentucky, bringing the slave Jenny with her, in 1805. Mrs. Simrall died in 1814. Administration was granted, in 1830, to the plaintiff in error, by the county court of Frederick county, Virginia.

It is a matter of doubt, whether Alexander Simrall was entitled to the slave Jenny immediately upon the death of the testator, or whether he had, under the will, any thing more than a remainder, and Mrs. Simrall a life estate. We have come to the conclusion, however, that the correct interpretation of the will gives the slave immediately to Alexander Simrall. It seems, that he acquiesced in a different interpretation, and permitted the widow to retain the possession. By her holding as tenant for life, and removing the slave to Kentucky, we think it may be fairly inferred, that the executors assented that the legacy might vest in the legatee, but were mistaken as to the widow's having a life estate. The question, under such circumstances, is, whether the possession of Mrs. Simrall was adverse to the right of the legatee, Alexander Simrall.

We think it was not. She never claimed the fee in the slave. Upon her death, her administrator could not take, because she only claimed a life estate, and that had terminated. As she held during life, recognizing a right in remainder, although it was a mistake, the devisee who had acquiesced in her claim, should be allowed to assert his right, without prejudice by lapse of time. As the limitation did not bar the right of the devisee, Alexander Simrall, during the life of Mrs. Simrall, the widow, holding as she did, it did not commence running after her death, until administration was taken on the goods and chattels of Alexander Simrall.

The instruction to find as in case of a nonsuit was erroneous. Wherefore, the judgment is reversed, with costs, and the cause remanded for a new trial.

Fall Term  
1833.

*Simrall's ad'r*  
vs.  
*Graham.*

Tenant for life, or one who, by mistake, is permitted to hold as such, does not hold adversely to the remainder man, or supposed remainder man, and the statute of limitations does not run against him.

A devisee of a slave, having acquiesced in the claim and possession of a supposed tenant for life, who survived him—the limitation did not commence running in bar of the right derived from the devisee, until after the death of the tenant for life; nor then, till administration was granted of the estate of the devisee.

Fall Term  
1833.

CHANCERY.

## Galloway *against* Hamilton's Heirs &c.

[Mr. Combs and Messrs. Morehead and Brown for Plaintiff: Mr. Cristenden for Defendant.]

FROM THE CIRCUIT COURT FOR BATH COUNTY.

November 11.

Judge UNDERWOOD delivered the Opinion of the Court.

A party holding a title bond for land, which he sells, assigning over the bond to his vendee, retains a lien on the land for the consideration— which, as against any subsequent assignee with notice, he may enforce, in chancery— without first obtaining a judgment at law for the debt.

If a former decree is relied upon as a bar, it must be duly pleaded; prayer, in an answer, that 'the pleadings & proofs, in a former suit, may be made a part of this cause,' does not present the decree—and altho' it be copied in the transcript, it will not be regarded in this court— The answer being that of an infant does not constitute an exception to this rule.

It is the duty of a circuit court to see that the rights of infants are protected,

THIS court has determined, that the assignor of a bond for the title of a tract of land, is entitled to a lien on the land to secure the purchase money, notwithstanding the assignee has parted with the bond by transfer to another, provided he had notice of such lien.

A bill in chancery is the proper remedy to enforce the lien, and may be prosecuted without obtaining a judgment at law for the purchase money. The case of *Halbert vs. Grant*, 4 Mon. 580, relates to the impeachment of conveyances for fraud, and does not embrace a proceeding to enforce a lien.

That Galloway had a lien, and that A. Hamilton was apprized of it before he took an assignment of Young's bond from Moore, cannot be controverted, so far as the questions depend on matter of fact. A decree should have been rendered in Galloway's favor, unless the bar relied on as growing out of the former suit ought to prevail. It cannot.

The administrators of Hamilton do not, in their answer, rely on any such bar. The heirs of Hamilton, who seem to be infants, and who answer by guardian, do not rely on a former decision in bar of the suit now prosecuted against them. The following quotation from the answer of the administrators, is all that is said on the subject. "Your respondents say that, on the 13th September, 1821, the complainant filed his bill in this court, against Archibald Hamilton (he being the intestate and ancestor of the defendants in error) for the same object of this bill, and similar allegations, and the said Archibald Hamilton answered said bill, and numerous depositions were taken by the parties and filed in said suit, and

by the final decree in the cause between the parties, said bill was dismissed *without prejudice*. Your respondents pray, that the pleadings and proofs in said cause may be made part of this cause, and be used and read so far as they are relevant."

If the extract be true, there never was a decree rendered which could bar the present bill. But even if there was such a decree it is not pleaded in bar. The *pleadings* and *proofs* only, and not the *decree*, are referred to, *to be used and read as far as relevant*. The reference seems to have been made for no other purpose than to let in the proofs. From the transcript of the former suit, however, it appears that the same matters were put in litigation, and that the bill was dismissed *absolutely*, instead of *without prejudice*. Can we look into the transcript and inspect the decree when it has not been pleaded as a bar, and give to it the effect of a bar, without any allegation in the answers setting it up, or relying upon it? A majority of the court think it cannot be done without departing from a long settled salutary rule, which discards proof without appropriate allegations to admit it. The clerk ought not to have transcribed more of the former record than was referred to and made an exhibit. All beyond that must be disregarded by us. Judge Nicholas thinks the whole record is sufficiently referred to, in order to give the infants the benefit thereof, and that the court should give effect to the former decree as a bar, although it has not been specially pleaded as such by them. The court, however, is unwilling to make the case of infants an exception. It is the duty of the circuit courts whenever the rights of infants are concerned, to appoint competent persons to defend for them and even to control their guardians *ad litem* so far as to require them to make every available defence which, in the progress of the cause, the court may perceive would protect the infant, and which could be relied on without violating good morals. But when the court does not, in the exercise of its discretion, interfere, and when the case is prepared and presented for trial on appeal, or writ of error, before this court, we see no sufficient reason for

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Galloway

vs.

Hamilton's  
heirs &c.

and every fair  
defence made  
in their behalf.  
—In this court,  
the rules appli-  
cable to other  
cases must be  
applied to theirs

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1833.

deciding it by rules variant from those applicable to every other case.

As therefore, Galloway has shewn a lien on the land to secure the unpaid purchase money, the decree must be reversed, with costs, and the cause remanded for further proceedings.

DETINUE.

### Cromwell vs. Clay.

[Mr. Monroe for Plaintiff : no appearance for Defendant.]

FROM THE CIRCUIT COURT FOR NICHOLAS COUNTY.

November 11.

Judge UNDERWOOD delivered the Opinion of the Court.

A deed, or bill of sale, to a purchaser *pendente lite*, is not void, but voidable.

One who buys a slave, while a suit is pending to subject it to the vendor's debts, takes the title dependent upon the event of the suit. If the suit fails, the title stands good. If it succeeds, the purchaser's title fails: but he may claim the surplus for which the slave sells above the amount of the decree.

The purchaser of a chattel, *pendente lite*, might recover it from his vendor if withheld by him.—But not from an of-

THE principal question worthy of consideration in this case, is whether the deed of a purchaser *pendente lite* is absolutely void, or voidable merely.

Cromwell instituted an action of detinue, founded on a bill of sale which Orear executed to him, for a slave, at a time when Piper and Waugh had separate suits in chancery pending against Orear, for the purpose of subjecting the slave to the payment of his debts. Clay, as deputy sheriff, took the slave into his possession, in virtue of an order from the chancellor.

The bill of sale from Orear to Cromwell was not absolutely void, as the circuit court supposed. As the chancery suits had not been decided, it could not be affirmed that the complainants would certainly obtain decrees subjecting the slave to the payment of their demands. If the bills shall be dismissed, then the bill of sale is unquestionably good. Nor does it lose its efficacy until the decree is pronounced in favor of the complainants. In the mean time, the title of the slave will vest under it, in Cromwell. If a decree is rendered subjecting the slave to the payment of Orear's debts, such decree will avoid the bill of sale to the extent of the debts.

If a surplus is left upon the sale of the slave, after paying the debts, such surplus might be claimed by Cromwell. The bill of sale is liable to be avoided by the decree, but it is not void. 2 *Maddock*, 189.

As the bill of sale is not void merely because a suit was pending, the next inquiry is, whether Cromwell, the vendee, should have been permitted to recover upon it. Had Orear been possessed of the slave, instead of Clay, and the action of detinue had been against Orear, Cromwell might have recovered against him. He could not have said, "the law protects me in the possession of a slave I have sold, in consequence of the pendency of a suit against me to subject the slave to my debts, or to recover the slave from me." But we apprehend the sheriff does not occupy the place of Orear in all respects. The sheriff's possession is under authority of law, and that possession cannot be legally divested by a *pendente lite* purchaser. The sheriff's possession is founded upon an order of the chancellor, which goes on the ground that the owner of the property cannot be trusted to keep it. The owner, after being divested of possession by such an order, cannot reclaim the property but with the leave of the court. A person claiming under the original owner stands in no better attitude.

The plea of *non detinet* was the only defence put in by Clay. Under an issue upon that plea, we think the records of the chancery suits were inadmissible evidence. Clay should, by special plea, have shewn how he came to the possession of the slave, and thus have afforded Cromwell an opportunity to deny the existence of the records relied on, or the taking the slave under the order of the chancellor. Clay having the custody of the slave, by authority of his office, under the order of the chancellor, should have pleaded the facts specially. See 1 *Chilly*, 121.

Judgment reversed, with costs, and cause remanded for a new trial, when the principles of this opinion must be observed.

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1833.

Cromwell  
vs.  
Clay.

sher who holds possession under an order of court. An officersued, is detinue, for a chattel that he has taken and holds under an order of court, must show, by his plea, how he holds it; evidence of his right to hold, is not admissible under a plea of *non detinet*.

Fall Term  
1873.

CHANCERY:

## Bibb *against* Smith and Others.

[Mr. Crittenden for Plaintiff: Mess. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR DAVIESS COUNTY.

November 11. Judge UNDERWOOD delivered the Opinion of the Court.

Statement of the  
case.

BIBB filed his bill against Smith, and others, for the purpose of subjecting to the payment of certain judgments, a debt which Anderson once owed Smith, and which he, as is alleged, fraudulently transferred to Allen, in order to deceive creditors, and put it beyond their reach.

Smith made his answer a cross bill, and prayed to be relieved from the payment of one of the judgments for four hundred dollars, because, as he alleges, the note on which that judgment was obtained, was a *gratuity*. From the statements of the cross bill, it seems that Smith, the defendant in error, was interested in establishing the will of William B. Smith, deceased, and that he made a contract with Bibb, as an attorney, to attend to and manage the suit (then depending before this court) for him; and that Bibb agreed to do it "in consideration of twenty five dollars in hand paid, seventy-five dollars to be paid some time thereafter, for which this respondent gave to said Bibb his note of hand, and one hundred dollars conditioned upon the will being established, and for which this respondent also gave his note; which notes are the foundation of two of the judgments in complainant's bill mentioned." The cross bill then proceeds to charge—"that after the said suit was argued and submitted to the court for their decision, the said Bibb induced him to give him, the said Bibb, another note for four hundred dollars, to be paid in the event of the said will's being established, and, as this respondent most positively states, without any other or additional consideration, than the services rendered in compliance with the con-



tract aforesaid." This note, from the allegations of the cross bill, is the foundation of the judgment for the four hundred dollars, against which the court is asked for a perpetual injunction.

Bibb demurred to the cross bill. Upon the hearing, the circuit court dismissed the original bill, with costs, and perpetually enjoined the collection of the judgment for four hundred dollars. To reverse these proceedings, Bibb prosecutes a writ of error.

Fall Term  
1833.

*Bibb*  
vs.  
*Smith &c.*

If the debt on Anderson was fraudulently transferred and shifted into the hands of Allen, with a view to defraud creditors, and if Allen held the demand for Smith's benefit, then there can be no doubt of the error on the part of the court in refusing relief upon the original bill. Whether the transfer was so made, and the debt thus held, is matter of fact to be enquired into. Anderson's deposition is the only one in the cause. He proves that Smith told him, "he was afraid that the money would be stopped in deponent's hands to pay debts he owed George M Bibb and others," and got him to give a new note to Aaron Smith. That it remained in that situation for some time, when, at the request of Smith, the defendant in error, the deponent executed a new note to Allen, for no other consideration than the old note. Smith said Allen intended to give every thing he was worth to Smith's children. Allen was present when the note was executed to him, and no consideration was mentioned, except the giving up the old note, and the deponent understood from the conversation between the parties, that the object was to prevent the money being stopped in his hands." The testimony of this witness leaves no doubt of the combination between Smith and Allen, to secrete the debt on Anderson, and to keep it from the creditors of Smith. If, therefore, it is corroborated by any circumstances, so as to preponderate against the answers of Smith and Allen, the decree should be reversed, and the cause remanded, with directions to grant relief to Bibb. We have been unable, however, to find in the record any corroborating circumstance which is sufficient to make a single deposition overturn the denials of the

If a debtor gets his debtor to give a bond to a third party, in lieu of one payable to him, or otherwise transfers his claims, to defraud his creditors, they may nevertheless be reached by an attachment bill. The denial of an answer must prevail against a single deposition without corroborating circumstances.

Fall Term  
1833.

*Bibb*

vs.

*Smith &c.*

A mere gift or gratuity cannot be enforced in equity. But against a judgment on a bond, (which imports a sufficient consideration,) unless the want, or failure, of consideration, total or partial, is *clearly shown*, the chancellor will not relieve on that ground; it cannot be inferred from the fact, that the payee "induced" the promisor to give his note, as a compensation above what had been agreed upon, for services rendered.

answers. It therefore follows that the court correctly dismissed the original bill.

We cannot approve the decree perpetually enjoining the collection of the judgment for four hundred dollars. We admit that the chancellor should never enforce a contract unless it be supported by a *good* or a *valuable* consideration. A mere gratuity cannot be enforced in a court of equity. *Banks vs. May's heirs*, 3 Marsh. 436. But here the chancellor is not called upon to enforce a gift or gratuity. On the contrary, he is asked to relieve against a judgment founded on a note, which, by the statute of 1812, possesses the dignity of a sealed instrument, and therefore *prima facie* importing a sufficient consideration. Before relief should be afforded, the complainant, in such a case, should clearly shew an entire or partial failure of consideration, or that there was no consideration whatever. All that Smith insists on is, that Bibb, for a compensation of one hundred dollars certain, and one hundred dollars conditional, engaged to perform the entire service in attending to the suit, and after it was argued and submitted to the court, Bibb "*induced*" him to give the additional note for four hundred dollars, by way of additional compensation for the services rendered. But what were the *inducements* held out by Bibb? What statements did he make? What were the facts? The record furnishes no answer to these questions. Suppose the labor of preparing the suit for trial, and the labor of the trial, and the argument before the court, were greatly more burdensome than anticipated, and that Smith perceiving it, chose, upon the suggestion of Bibb, to make additional compensation, would a note executed for that purpose require the interposition of the chancellor to prevent its collection.

Contracts between attorneys and their clients are viewed with suspicion; and conveyances betwixt them have been set aside, upon the idea

We know that transactions between attorneys and clients do not stand, in the eye of the law, precisely upon the same footing with those which take place among men not connected by any confidential relation. See 1 *Maddock*, 114. A court of equity has frequently overhauled contracts between attorney and client, and set

aside conveyances, upon the ground, that the attitude of the lawyer enabled him to take an undue advantage of the client, and that he availed himself of the opportunity to do it. To justify the interference of the chancellor in such cases, it should appear, that the attorney excited fear in his client, and abused his influence to obtain an exorbitant reward, or that the transaction was tainted by fraud, misrepresentation or circumvention. The allegations of the cross bill (which are confessed by the demurrer,) do not shew, that Bibb abused his influence, or practised any fraud, misrepresentation or circumvention.—

On the contrary, it is fairly to be inferred, that he had performed his engagement, and consequently, that his influence could not thereafter be made to operate in such manner as to extort from his client an exorbitant reward. When the labor is over, and the cause submitted to the court, there is little danger from improper influence, and then the client may be generous if he pleases to be so. If, under such circumstances, he executes a note, and suffers judgment to go by not defending at law, we do not perceive the obligation on the part of the chancellor to relieve him. If the note had been given to stimulate Bibb to greater exertions before the services were rendered, we are inclined to think that its acceptance by Bibb, as additional compensation, after a previous bargain, for a full fee, would have been sufficient to authorize the conclusion that it was obtained by the exercise of an improper influence, and had the case presented itself in that aspect, we would not have disturbed the decree.

The record does not shew, taking all the allegations of the cross bill to be true, that Bibb violated his duty as attorney, in order to “*induce*” Smith to execute the note. Under all the circumstances, therefore, we think the court erred in perpetuating the injunction. Wherefore, that part of the decree is reversed, with costs, and the cause remanded with directions to dismiss the cross bill.

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1832.

*Bibb*

vs.

*Smith &c.*

that the lawyers might, and probably did, take advantage of their situation to procure them. Contracts made after the lawyer's services are completed, are not liable to this objection. Nor should the chancellor interfere, in any case, unless it appears that the lawyer has, in some way, taken an undue advantage of his station, or influence, in making the bargain.

Fall Term  
1833.

CHANCERY.

## Adams against Dunlap.

[Mr. Amos Davis for Plaintiff: Mr. Simpson for Defendant.]

FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY.

November 12. Chief Justice ROBERTSON delivered the Opinion of the Court.

A judgment on a note, with credits endorsed, which are not allowed in the verdict, is erroneous.—But a bill in chancery will not lie for restitution after the judgment has been paid. The remedy, if any, is by assumpsit.

If one pays a claim against which he has a set-off, chancery has no jurisdiction of the case.—Nor has it jurisdiction of so small a sum as \$12 50.

DUNLAP sued Adams on a promissory note for five hundred dollars, with sundry credits endorsed on it. A jury sworn to enquire of damages, returned a verdict in favor of Dunlap, for one hundred and ninety seven dollars and seventy four cents.

After the amount of the judgment had been coerced by execution, Adams filed a bill in chancery, alleging that he had been allowed only fifty dollars as a credit for one hundred dollars in notes of the Bank of the Commonwealth, which had been indorsed on the note as one hundred dollars in said notes; and also alleging, that, in other respects, the full amount of the indorsed credits had not been allowed to him, and that he had paid to Dunlap, a saddle, at the price of twenty five dollars, which had not been indorsed on the note as a credit, but that Dunlap had allowed a credit for twelve dollars and fifty cents only, on the enquiry of damages, which was taken in his (Adams') absence.

Dunlap denied, in his answer, that Adams was entitled to any relief, or that any injustice had been done to him. But the circuit court decreed to Adams, seventy eight dollars and forty eight cents, with interest, and costs.

The decree cannot be sustained. If the jury did not allow as much for the indorsed credits as Adams was entitled to, the judgment on the verdict was erroneous. A bill in chancery for restitution, could not have been sustained, after the amount of the judgment had been paid. If there be any available remedy, it is assumpsit.

As to the price of the saddle which had not been indorsed, Adams might have been entitled to a set-off for the difference between what he was entitled to for the saddle, and the sum for which Dunlap gave credit. But

having paid the judgment, he cannot recover by bill in chancery, even if he be entitled to any thing. The chancellor had no jurisdiction, especially as the amount was only twelve dollars and fifty cents.

Decree reversed, and cause remanded, with instructions to dismiss the bill.

Fall Term  
1883.

*Wickliffe*

vs.

*Clay*

and *e converso*.

*Wickliffe against Clay*

and

*Clay against Wickliffe.*

CHANCERY.

*Cross Appeals*

[Mr. Wickliffe in person, with Messrs. Morehead and Brown, on his side :  
Mr. Crittenden for Mr. Clay.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court. *November 12.*

IN June, 1808, Henry Clay and William Lytle entered into a written contract for exchanging real estate which Clay owned in Louisville, for a house called "*The Traveller's Hall*," and for a lot with a brick stable thereon, and for other property, all of which Lytle held in Lexington.

Statement of the  
case.

On the 9th of November, 1808, Clay sold the stable and the lot on which it stood to John P. Wagnon, for eighteen hundred dollars, (a part of which, to wit, eight hundred dollars, was then paid in four chandeliers, and the residue, one thousand dollars, was to be paid in three years, with accruing legal interest from the first of November, 1808,) and agreed to convey the legal title upon the payment of the whole price.

A writing, containing their mutual stipulations, having been executed by the parties, was assigned by Wagnon to George Matthews, in 1809; by Matthews to William T. Barry, in 1810; by Barry to John T. Mason, on the 30th of June, 1819, and by Mason to Robert Wickliffe, in August, 1819.

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1833.

Wickliffe

vs.

Clay,

and e converso.

There had been two other intermediate sales of the lot—one by Barry to Young, and the other by Young to Castleman; but Clay's covenant had not been assigned to either Young or Castleman, and, in 1825, the contract between *them* was rescinded, by a decree rendered on a bill which had been filed for that purpose, by Castleman, in 1815.

In 1817, Wickliffe, who, by some contract with Philips and wife, claimed one moiety of the lot, brought an action of ejectment in their names against a tenant in possession under Castleman; and, in March, 1819, obtained a judgment of eviction for the entire lot, of which possession was given, by a *habere facias*, prior to the assignment to Wickliffe of Clay's covenant.

In 1818, during the pendency of the action of ejectment, Clay and Lytle, and others who were interested, apprehending that there was no other available title to the lot than that of Philips and wife, and being desirous to quiet further controversy, proposed to Wickliffe, who claimed to act as the agent of Philips and wife, to sell both his own right and the title of his constituents to Lytle; and accordingly Wickliffe covenanted to make the title, or cause it to be made, to Lytle, upon the payment of the stipulated consideration (\$1250,) for which Lytle gave to him a promissory note. But Lytle having failed to pay any part of the twelve hundred and fifty dollars, and having also become insolvent, the title was never conveyed to him.

In 1814, Young, then holding the lot under Barry, uninfluenced by any apparent or presumable apprehension of a defect of title in Lytle or Clay, pulled down the stable, then much impaired by age and use, and converted the materials into another house, which he built on another lot. The stable had been built by Lytle, in 1801, and had been used as an appurtenance to "*Traveller's Hall*" prior to Wagon's contract with Clay. But Wagon seems to have designed to use it as a livery stable.

Clay (claiming a balance still due from Wagon on the contract of 1808,) and Wickliffe (claiming damages as assignee of that contract,) agreed, as must be inferred from an undenied allegation to that effect in one of

Wickliffe's cross bills, that Clay should file a bill in chancery against Lytle, Wickliffe, Barry and Mason; and that Wickliffe should make his answer a cross bill, and thus, at once, without circuitry, have the whole controversy settled.

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1833.  
*Wickliffe*  
vs.  
*Clay,*  
and *e converso*.

Accordingly, in July, 1825, Clay filed his bill, alleging, among other things, the most of the foregoing facts, and praying, first, for a specific execution of the contract between Lytle and Wickliffe; and, second, for an enforcement of an equitable lien which he seemed to suppose that he held on the lot for the unpaid residue of the price which Wagon had covenanted to pay for it.

Lytle never answered the bill, which was eventually abated as to him in consequence of his death.

Wickliffe, in sundry answers, all in the nature of cross bills, resisted a decree for enforcing his contract with Lytle, and prayed for a decree rescinding the contract between Clay and Wagon, and compelling Clay to pay to him (Wickliffe,) the whole amount of what he had received on that contract, without any abatement for the stable, or for the use of the lot or the stable, and also prayed for a decree against Mason and Barry.

Clay, in sundry answers to Wickliffe's cross bills, and in amendments to his original bill, set forth various additional facts, and insisted, first, that the chancellor could not take cognizance of Wickliffe's cross bills for rescission and for damages; second, that the stable was the chief ingredient in the estimated value of the property which he sold to Wagon—that it was worth more than the lot, and that, as Wagon and those who held under him enjoyed the full and undisturbed use of the stable and of its entire value, *without responsibility*, there had been no breach of covenant, or failure of consideration to the extent of the estimated price of the stable; and that, consequently, he (Clay) should be entitled, on a rescission of the contract, to a credit *pro tanto*, and should be held liable for no more than the estimated value of the lot without the stable; third, that the price which he agreed to allow for the chandeliers, was merely nominal, and exceeded their real vendible value more than four hundred dollars, and that he allowed, in the

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*Wickliffe*  
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*Clay,*  
and *e converso.*

Decree of the  
circuit court.

contract, eight hundred dollars for them, not because they were deemed of that value, but only because Wagnon agreed to give him, for the stable and lot, a price correspondently exorbitant and fictitious; and, therefore, that he (Clay) should not be charged in equity with more than the actual value of the chandeliers.

The circuit court, having continued the case as to Barry and Mason, and heard it, by consent, as between Clay and Wickliffe, decreed, at the October term, 1831, that the contract between Clay and Wagnon should be rescinded; and that Clay should pay to Wickliffe the amount which had been paid on that contract, with six per cent. thereon from the times when received, "until paid," after deducting nine hundred and sixty four dollars and thirty cents—the proportionate value of the stable in the aggregate price of eighteen hundred dollars, exceeding seven hundred and fifty dollars (the value of the stable as reported by commissioners,) in the ratio in which eighteen hundred dollars (the price allowed in the contract for the lot and stable,) exceeded fourteen hundred dollars—their total actual value at the date of the contract, as estimated in the report of the same commissioners; who had been appointed to ascertain by proof, and report the true value of the lot and stable at the time of the contract, and also their then relative values; and also, that so much of the nine hundred and sixty four dollars and thirty cents as should remain after extinguishing the eight hundred dollars, which had been paid in the chandeliers, should be applied, without accruing interest, as a credit on the second payment made by Wagnon, on the 6th of September, 1809.

Appeals.

From that decree both Clay and Wickliffe have appealed.

Errors assigned  
by Wickliffe.

Wickliffe insists, that the court erred, *first*, in hearing the case as between him and Clay alone; *second*, in not decreeing finally in his favor against Barry and Mason, and, *third*, in allowing the credit for the stable.

Errors assigned  
by Clay.

The errors assigned by Clay may be reduced to the following propositions:—*first*, that the circuit court had no jurisdiction of Wickliffe's cross bills; *second*, that no decree ought to have been rendered against Clay; *third*



that he ought not to have been charged with as much as eight hundred dollars for the chandeliers, and, fourth, that, in other respects, the decree is exorbitant and unjust.

By consenting that the case should be heard as between himself and Clay alone, Wickliffe waived all objection to the hearing, even could there otherwise have been any available objection to such a hearing. And, although it appears from a supplemental record, that, at a subsequent term, the circuit court dismissed Wickliffe's cross bills against Barry and Mason, nevertheless, as the appeal bond which Wickliffe was required to execute on his appeal from that decree, was never executed, that appeal is not before this court, and therefore the second error, as assigned by Wickliffe, cannot be now considered. *Clinton et al vs. Philip's Adr. 7 Mon. 117.*

As the third error which has been assigned by Wickliffe, is necessarily connected with the fourth error which has been assigned by Clay, they will be considered together. We shall, therefore, proceed to consider, in their numerical order, the errors of which Clay complains.

I. It is not necessary to enquire whether the chancellor would have had jurisdiction of an original bill containing the matter exhibited and relied on in the cross bills. Nor is it material now to decide whether, as the contract between Clay and Wagnon was a covenant *inter parties* and contained mutual stipulations, and therefore was not assignable so as to pass to the assignee any legal interest, a suit at law in the name of Wagnon, for Wickliffe's benefit, was the only proper remedy for Clay's breach of the covenant; or whether a suit in chancery for damages, might have been maintained by Wickliffe, in his own name, against Clay; for, whether the matter of the cross bills be, *per se*, legal or equitable, the jurisdiction depends solely on its connection with the subject matter of the original bill to which they responded. Therefore, had the enforcement of the agreement be-

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Parties consenting to a separate hearing of a cause, as between themselves, (when there are other parties) waive any objection there may be to that course; and cannot avail themselves of the irregularity—if any—upon an appeal.

An appeal granted, becomes a nullity upon a failure to give the appeal bond as required; and will not be considered in this court.

The connection of the matter of a cross bill—be it, *per se*, legal or equitable—with the subject matter of the original bill, gives the chancellor jurisdiction of the cross bill—of which he can not be ousted by a dismission of the original bill.—If the sole object of a bill were to enforce a contract, a cross bill to rescind a different contract, and with other parties (about the same property) would not lie.—

But where the vendor of land, among other things in his bill, asserts a lien for the purchase money, against an assignee of his covenant for a title, the latter may maintain a cross bill for a rescission of the contract.

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Where a vendor of land cannot make the title, he must submit to a rescission, and return of the consideration.

The valuation which the parties put upon a commodity given & received in payment, or in barter, must, in general, be taken, by the chancellor, as the actual value.

Of the stable &c.

tween Wickliffe and Lytle been the only object of Clay's bill, the chancellor would have had no jurisdiction over Wickliffe's cross bills for rescinding a different contract, and between other parties. But, as Clay also prayed for a decree enforcing a lien which he asserted as resulting to him in equity, in consequence of his contract with Wagnon, and therefore, prayed, virtually, for a specific execution of that agreement also, Wickliffe had a right to make his answer a cross bill, and retort a converse prayer for a rescission of the same contract, and for an adjustment of all consequential rights and liabilities, whether legal or equitable; and Clay's subsequent dismissal of his bill did not affect Wickliffe's cross bill.

II. As it is evident that Clay cannot make a title, he should not object to a rescission of the contract between himself and Wagnon, and a restitution, upon equitable principles, of the value which he had received for the lot; and, consequently, so far as he is concerned, it was but right to decree a rescission at least.

III. The vendible value of the chandeliers depending, as such value of such a commodity necessarily did, on the taste and judgment of the vendor and the purchaser, and on other adventitious and variable circumstances, the price at which they were estimated in the contract, by the parties themselves, should not be reduced or augmented by the chancellor, unless facts, far different from any which have been *established*, had appeared to justify some equitable modification according to a different standard; for Wagnon might not have been willing to take for the chandeliers less than eight hundred dollars, even though their actual value, in the opinion of other persons, had not exceeded four hundred dollars; and Clay might not have been willing to allow more than eight hundred dollars, even though some other persons had deemed them worth sixteen hundred dollars.

IV. The last question upon the merits involves the whole measure of right between the parties, and is, of course, more comprehensive and important than all the other points together.

Upon rescinding the contract, Clay's equitable responsibility to Wickliffe, or whoever may be entitled to the

full benefit of Wagnon's equity, should be precisely what it would have been to Wagnon himself, had there never been any assignment by him. And, as no statutory rule is applicable, the measure of responsibility must be regulated by reason and analogy, and the dictates of conscience and equity. The criterion which all these seem to establish, is, *that the loss actually sustained should be repaired, so far, and so far only, as correspondent benefit was received.*

There is no reason to doubt that Lytle took possession of the lot, not as a wilful trespasser, but in good faith, (not then knowing or apprehending that it was the property of Philips and wife,) and that, whilst thus possessed, he erected the stable in equal good faith; and therefore, he, or any other person claiming under him, had a perfect right, according to the doctrines of the civil law, altogether consistent in this respect with the principles of the common law, to remove the stable, *without doing any injury to the lot itself*, whilst he was in possession; and consequently, by such a removal, no liability was incurred to the true owners of the lot. To the extent then of the value of the use of the stable, until its removal, and of its value at that time as a movable structure, Clay had an indisputable right which he transferred to Wagnon, and of which the latter and others under him enjoyed the full benefit; and, to that extent, therefore, no damage resulted from the eviction from the lot. Even had there been no removal of the stable, Clay, or the person holding under him, would, after eviction, have been entitled to the *accessary* value which the stable imparted to the lot at the time of eviction; and, in that event, there would, to that extent, have been no loss to the vendee; because, so far at least, an available and beneficial right had been transferred to him, and of which the eviction could not have divested him. Though Clay's right to the stable was ostensibly less valuable than it would have been had his title to the lot been perfect and paramount, still it was *potentially*

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Where one in possession of land, held, *bona fide*, as his own, has erected buildings thereon, he (or those claiming under him) may remove them, without incurring any responsibility to the owner of the paramount title.

If one buys land, with buildings upon it, *which he moves off*, and then loses the land, by a better title appearing, his vendor, upon a rescission of their contract, will be entitled to retain, out of the consideration to be restored, *the value of the buildings so removed*: — not their estimated value at the time of the sale, but so much as they would have been worth (preserved with common care) as additions to the land at the time of the eviction—equivalent to what the occu-

pant could have recovered for them of the successful claimant. — And where the removal was without the consent or privity of the party against whom the decree for a restoration of the purchase money, is obtained—he may (because of the difficulty of the proof) elect to retain the value of the buildings according to the above rule, or as moveable structures.

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equivalent to the price at which it was estimated in the contract, and was actually so, if the amount which the evictor would have been bound to pay for it, had it never been pulled down, or the amount to which it would have entitled Young, had he been evicted before it was removed, would have been equal to its value at the date of the contract between Clay and Wagnon.

It is argued, however, that there should be no enquiry as to the value of the stable at any other time than when it was sold by Clay; because Young removed it voluntarily and without being influenced by any apprehension of a defect of title; and therefore it was used and appropriated just as it would have been had Clay's title been unquestionable, and was consequently as beneficial to the vendee, as it would have been if there never had been any eviction from the lot; and that, therefore, as Wagnon, and others holding under him, never lost the stable, Clay should not account for any portion of the price which he received for it, or at which it was estimated in his contract. This must be the view which the circuit court took of the case, and certainly it is very plausible; but we are inclined to think, that, when analyzed, it will not present a basis sufficiently stable, or certain, or accordant with any known rule of equity, to maintain the decree which has been founded upon it.

Had the house alone been sold, there can be no reasonable doubt that Clay would not be liable; and had the value which Wagnon fixed on the stable at the time of the contract, been certainly ascertained, and had it been satisfactorily proved that the stable was the only or principal object of his purchase, perhaps it might have been but equitable that Clay should not be required to refund any portion of the price which he received for the stable. But it would be difficult to prove what Wagnon would have given for the lot without the stable, or what he would have given for the stable without the lot; or whether he would have bought the one without the other; or at what price he estimated the stable in the contract; or what it was in fact worth to him; and there has been no proof on those points. A vendor of improved land may estimate the improvements at a

much higher price than their true value to the vendee, or than the vendee estimated them; and, though they may have cost much, still the purchaser might not deem them of great, or even of any, value to him; and yet, desirous, for peculiar reasons, to own the land, he might be willing to give for it as much more than its real value, as his estimate of the accessory value of the improvements is exceeded by that of the vendor. And, even though the improvements had been the chief object of his purchase, they may not have been worth to him, or he may not have deemed them worth as much as the vendor exacted for them, or as others would say they were worth. In any such case, it would be obviously unjust, in the event of an eviction, after a removal of the improvements, to allow the vendor a credit for the amount at which commissioners might estimate them at the date of the purchase. The only safe rule, is to consider the land and the improvements as an entirety—so sold and so bought; and to allow the vendor a credit for so much only as the vendee would have had right to demand for the improvements, of the evictor, had they remained on the land until the eviction. A case might occur which would authorize the application of a different rule; but there is no such peculiarity in this case as to except it from the operation of the principles which must govern cases generally between vendors and vendees.

But, as the removal of the stable, without Clay's privacy or concurrence, has imposed on him the hazard of not being able to prove, that its accessory value, at the time of eviction, was as great as it might actually have been had it not been removed, or of not being able to prove, that it would have been any thing, he should have the election to take the value of the stable as a movable structure, or whatever it was, as such, worth to Young, when he removed it. In ascertaining what would have been the value of the stable at the time of eviction, or what the evictor should have paid for it, had it been permitted to remain on the lot until the eviction, it should be considered such as it should be presumed to have then been, had it been used and repaired

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as a reasonably careful and provident occupant would have used and repaired his own property. According to that standard, the presumable value of the stable, at the time of eviction, should be ascertained; its value as a movable improvement of the lot, at the time when it was removed, should also be ascertained, and Clay should then be permitted to make an election of the assessment which he may prefer; and should be allowed a credit accordingly.

The use of land, and the interest on the consideration paid for it, are, in general, to be considered equivalent, and to be set off against each other.— But, as the evictor may recover for *mesne profits* for 5 years, the party evicted is entitled to interest, for the same term, on the consideration recovered back, from his vendor.

The use of the consideration, and that of the lot, should be deemed equivalent. This, as a general rule between vendor and vendee of equal good faith, is just and reasonable. But, as the evictor was entitled to *mesne profits* for five years, Clay should be charged with interest for five years prior to the eviction, on the amount which he had received.

Wickliffe will be entitled to a decree for the amount of purchase money which was actually paid to Clay, with legal interest thereon, from five years before eviction, to the time of rendering the decree; after deducting the value of the stable, with interest to the same time, from the period elected for fixing its value, and also, the interest on so much of the consideration as Clay never received, to be computed from the date of the contract, to five years prior to the eviction.

A writing containing mutual covenants is not assignable by law, and the transfer passes only the equitable right: hence in a chancery suit upon such a writing, by a remote assignee the covenant is a necessary, and the intermediate assignees are proper parties.

Where there is a want of necessary parties, this court will not, in general, consider the merits of the case. But, at the request of the parties here, the merits, as between them, may be decided.

As Wagon's assignment passed only an equitable right to Clay's covenant (it being mutual and therefore not assignable by law,) Wagon was a necessary, and Matthews a proper party: and therefore the merits of the case would not have been considered had not the present parties agreed in writing that, as between themselves, the cause should be now decided on the merits. On the return of the case to the circuit court, the proper parties should be made; for, otherwise prejudice to Wagon, at least, and other suits about the matters now involved, might be the consequences of a final decree between the present parties.

Wherefore, it is decreed and ordered, that the decree of the circuit court be reversed, and the cause remanded for further proceedings and decree conformable with this opinion.

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# The Commonwealth vs. James C. Rodes, INFORMATION Clerk of Fayette County Court.

Dana  
1d 595  
110 531

[Atto. Gen. Morehead, Mr. Haggis, and Mr. Chinn conducting the prosecution: Messrs. Wickliffe and Wooley and Mr. Crittenden for Defendant.]

THIS prosecution was commenced in the Court of Appeals—it being one of those cases, of rare occurrence, of which this court has original jurisdiction, by the constitution.—As the written Opinion of the court, delivered upon the final decision, is confined to the facts established upon the trial, the law, and the requisitions of the law thereon arising, it may be proper to note here, the points made and decided *orally*, in the course of the preliminary proceedings.

The Attorney General, on the 27th of April, 1832, moved, in his official capacity, for leave to file the information. The court enquired whether the charges were accompanied by any affidavit shewing that there was probable cause for the prosecution. This was answered in the affirmative, and an affidavit of Gabriel I. Morton, annexed to the information, was read, in which he stated that he believed the charges to be true, and that he had made diligent and strict enquiry concerning them. The leave was then granted; the information filed, and a summons, in which the charges should be recited at length, was directed to be issued, requiring the defendant to appear on the 7th of May—when, it was understood, a day would be fixed, by agreement, or by order of court, for the trial.

The charges against a Clerk, prosecuted for breach of good behavior, must be supported by affidavit, before they can be filed.

The summons, against the defendant, should recite the charges at length.

Three days afterwards (April 30,) the Attorney General moved for leave to file additional charges; but a majority of the Judges were of opinion, that this should not be allowed, and the motion was overruled.

The information cannot be amended by adding charges.

On the first of May, the defendant, with his counsel, came into court, and entered his appearance. The cause was then assigned for trial on the 16th of October, in the next term.

Upon the defendant's appearing, a day will be fixed for trial.

A few days before that fixed upon for the trial, the Attorney General moved the court to make an order requiring the defendant "to produce all the original papers in his office in relation to the marriage license between Bushrod Boswell and Isabella Lowrie; the order books of the county court, containing orders upon the application of D. Castleman, relative to the Iron-works road, and all the summonses, or other process issued by him relative to the application.—To produce his original fee books, from 1825 to 1831 inclusive." And it was ordered accordingly.

A Clerk prosecuted for breach of good behavior, will be required to produce any papers or books belonging to his office, that may be wanted as evidence.

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Buying his office—coming in by hiring his predecessor to resign and procure his appointment, is not an act in a Clerk, upon which a prosecution for breach of good behavior in office, can be founded.

On the day first fixed for the trial—October 16, 1832, the defendant, by his counsel, presented a motion, in the nature of a *demurrer*, to strike out of the information, one of the charges, in substance as follows:—"That before and at the time of committing the offence hereinafter mentioned, one John D. Young was the duly appointed clerk for the county court of Fayette county; and heretofore, viz. on the — day of — 1817, it was corruptly and against the form of the statute in such cases made and provided, agreed by and between the said Young and the said James C. Rodes, as follows, in substance: that the said Young should, for the consideration hereinafter mentioned, resign and relinquish his said office of clerk of the Fayette county court in favor of the said Rodes, and should cause and procure the said Rodes to be appointed to said office of clerk of Fayette county court; and said Rodes agreed to pay said Young therefor, the sum of six thousand dollars; and he said Rodes to be entitled to receive and take to his own use and benefit, all the emoluments and reward which should and might arise therefrom. And in pursuance of said corrupt and unlawful agreement, and on the terms thereof, afterwards, viz. on the — day of — 1817, the said Young, at the special instance and request of the said Rodes, did resign and relinquish his said office of clerk of the Fayette county court, and did, then and there, at the like special instance and request of said Rodes, cause and procure the said Rodes to be appointed clerk of the Fayette county court in lieu and stead of him said Young, for which said Rodes, after he became clerk, in consequence of said corrupt agreement, assigned to said Young, in consummation thereof, two notes of Samuel Redd for fifteen hundred dollars each, and executed his own note to said Young for one thousand dollars, and also his note to William D. Young for two thousand dollars, making together the sum of six thousand dollars; by virtue of which said before mentioned appointment, made in consequence of the corrupt agreement aforesaid, the said Rodes still continues to hold the office of clerk of the Fayette county court." This motion was submitted without argument, and upon consideration, a majority of the Judges—*Judge Nicholas* dissenting—were of opinion that this court could not take jurisdiction of this matter, in this form of trial; the motion was, therefore, sustained and the charge directed to be stricken out, and disregarded.

Collecting taxes in specie, and paying over in *Common'lth's* bank notes, not ground for removal.

This decision was followed by another motion, of similar character, in relation to various other charges contained in the information; and which was, in like manner *sustained*, so far as related to certain portions of the charges, in substance as follows:—

*First.* That the defendant clerk, in certain specified fee bills issued by him had "corruptly charged fifty cents for tax, and had collected the same in specie, and accounted to the Commonwealth, for Commonwealth paper, which was greatly depreciated."



*Second.* So much of a charge as related to fee bills alleged to be illegal, but not *particularly* set out in the information, but referred to by the words—"besides many others not enumerated;" which words were ordered to be stricken out.

*Third.* A *general charge* of habitual extortion in this form—"It has been his constant and uniform practice during the whole time of his continuance in office, under color of said office, up to the present period, to issue fee bills containing on their face, the most palpably illegal and improper items and charges;" which sentence was also directed to be stricken out.

The court, then, upon the earnest solicitation of numerous witnesses, who were anxious to be discharged on account of the appearance of *the cholera* in Frankfort, and other parts of the country, consented to lay the cause over to the next term: when it was again continued, upon the defendant's motion, with cause shown, until the third Monday—21st day of October, 1833, when the trial commenced, and occupied the court during five days.

The grounds of accusation having been narrowed down, by striking out one entire charge, and portions of others, as above stated, those upon which the trial was finally had, will appear by the statement of the case and Opinion of the court, afterwards delivered by CHIEF JUSTICE ROBERTSON, as follows.

THIS is an information by the Attorney General, against James C. Rodes—the clerk of Fayette county court—charging him with misbehavior in office.

The information contains two charges:—

*First.* That Rodes fraudulently and illegally antedated a marriage license for a contemplated marriage between Bushrod Boswell and Isabella Lowry; that he took no bond, as required by law; and that, afterwards, to avoid a prosecution for official delinquency, he procured a bond to be executed, and fraudulently inserted in it a false date.

*Second.* That Rodes, as clerk of the county court of Fayette, "did illegally and corruptly demand payment twice for the same services;" that he had, for a series of years, culpably failed to transmit to the clerk of this court, memorials of deeds which had been recorded in his (Rodes') office, and nevertheless corruptly charged the fees allowed for transmission; that he had habitually "split up" services for which the law allowed but one charge, and that he had done so since the first of June, 1830; and that he had been guilty of extortion upon free negroes, by exacting from them illegal charges.

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*Rodes, Clerk.*

The information against a clerk must state the charges *specifically*—general charges will not be regarded.

November 11.

Statement of the case, and of the charges upon which the trial was had.

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Recital of the evidence as to the marriage license—and conclusion, that, for a clerk to antedate an official paper, under any circumstances, is improper, and wholly unjustifiable—but the charge may be attended by such palliating circumstances [see the text] as will relieve this court from the necessity of removing him from office.

Judge Underwood thinks it the imperious duty of the court to remove a clerk for such an offence, committed under any circumstances.

On the trial, upon a plea of not guilty, unusual liberality was extended by the court, to the Commonwealth, as well as to the accused, and much irrelevant testimony was heard. Having patiently and anxiously considered all the facts which could, in any degree, legitimately bear on the case, we shall now proceed to make a final disposition of it, by briefly noticing the effect of the proof as to each of the charges.

I. The evidence sufficiently proved, that the marriage license had been antedated by Rodes, as charged. The marriage was in 1821; the license, as issued, was dated in 1817. Boswell urged Rodes to antedate the license for the purpose of legitimating (as he seemed to think such antedating might) the offspring of an illicit intercourse between the parties who were about to intermarry. Rodes objected and hesitated; and expressed the opinion that such an act could have no such effect; but, at last, he yielded, observing that the date of the license, or of the bond, would be immaterial.

The court is not allowed to decide, that no bond was taken at the time when the license was issued. Whether the bond was executed before, or after, the marriage, may be doubted; but we are inclined to the opinion that it was before. It was, however, certainly antedated; though the date of the bond and that of the license do not correspond. The cause of the discrepancy in that particular has not been satisfactorily explained; nor is it material that it should be ascertained.

In thus antedating the license and the bond, the clerk has been guilty of very great indiscretion. Such official falsehood should never be uttered or countenanced, and cannot be justified by any circumstance, however importunate, or by any motive, however benevolent or pure. All the circumstances prove satisfactorily that Rodes was not actuated by any sinister or mercenary motive; but was influenced by an innocent belief, that he was doing no essential wrong, and was prompted only by a generous and accommodating disposition. He knew that the date of the license, or of the bond, was immaterial; because the time of the marriage would be identified by the clergyman's certificate; and the legal

obligation or effect of the bond could not have been affected by its date. No loss or injury, private or public, has resulted, or can ever result, from the false dates of the license and the bond. The clergyman, who was the principal witness for the Commonwealth upon the material allegations in the first charge, swore that he had no other intention than to certify to the clerk, according to law, the marriage, and the true time when it was celebrated.

Neither the license nor the bond is a record; nor was it necessary or proper that either of them should have been recorded.

Many intelligent and highly respectable witnesses, living in almost every neighborhood in Fayette county, testified, that Rodes is generally, and almost universally, deemed a man of high and unblemished character; that he is a faithful and obliging officer, and an honorable, kind, amiable man.

Upon these general facts, Judge Underwood is of the opinion, that the official duty of the court requires a judgment of *amotion*; that no innocence, or generosity of purpose—no purity or excellence of private character; no propriety or ability, or popularity of general official conduct, can be allowed to palliate the conduct of a clerk who wilfully affixes a false date to a public document. He thinks a clerk ought not to be allowed to decide, whether any mischief may result from his act of misdating papers; and, as he apprehends, that great and alarming mischief might spring from allowing such an act to be excused, in any case, or under any circumstances, he is of the opinion, that the public interest imperiously requires, that an example should be made of all clerks who shall have thus offended; and that, therefore, it is the duty of this court, on the first charge, to remove Rodes from office.

The Chief Justice and Judge Nicholas do not concur with Judge Underwood. They think that, though no motive, however innocent, should excuse a clerk for a falsification of his records, or for an untrue certification of a matter of record, nevertheless, motive, as well as general character and conduct, should have an important

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A marriage license, or bond, is no record.

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influence in determining the character of such an act as that imputed in the first charge. They think that it is not the *duty* of this court to remove a clerk from office for every misdemeanor, whatever may be its complexion or its consequences; that it is the *duty*, as well as the privilege of the court, to exercise a sound, comprehensive and discriminating discretion over that class of official lapses and delinquencies which are untinged with impurity, and which do not, by evincing incapacity or corruption, tend directly and essentially to the destruction of public confidence, or the obvious jeopardy of the public security; that the inoffensiveness of the motives which actuated Rodes—the goodness of his proven character in *his county*—the public opinion of the intelligent community in the bosom of which he has lived and acted ever since he has been its officer, where all his conduct, public and private, has been scrutinized, and where, too, all the circumstances characterizing the official act, proved under the first charge in the information, were most seriously considered and best understood—the lapse of time, during which he seems to have earned a fair name—the death of both Boswell and wife, and perhaps of others, who might have been important witnesses in his behalf:—that all these considerations, when connected with the intrinsic character of the imputed malversation, are justly entitled to great, if not to a decisive influence, on the judgment and discretion of a tribunal, deciding, as a jury, the facts, and adjudging, as a court, the law; whose sentence will be irrevocable and, if condemnatory, fatal and enduring, and from the effects of which no voice of mercy or of pardon could ever rescue its degraded victim. They think, that the safety of the public has not been endangered by the improper and inadvertent conduct of Rodes (*twelve years ago*), when that conduct is rightly considered, and his subsequent character, and the confidence of his *countrymen* in his integrity and official fidelity are also considered; that if he be guilty of no other offence, he *may* be, as the proof attests that he is, a good clerk and an honest man, notwithstanding the indiscretion of one hasty and unguarded act of his official life;—and that, therefore,

neither the interest of the Commonwealth, nor the conscience or duty of this court, requires his removal from office under the first charge. And consequently, in the exercise of what they deem a sound and prudent discretion, they pronounce, as to the first charge, a judgment of acquittal—though not of approval.

II. Under the second charge, sundry fee bills were exhibited: some containing charges which, though they are excessive, other clerks are in the habit of making; and some others containing charges which are apparently erroneous. As to the first class, it is the opinion of the whole court, that the erroneousness of some of the charges is insufficient to prove either incapacity or corruption, and that, therefore, such errors would not justify a judgment of annulment. But some of the fee bills of the second class apparently exhibit a signal exemplification of that "splitting up" of orders which it was the object of the act of 1830 to prevent. Fee bills for services of the clerk in the emancipation of slaves, belong to that classification. The following is an example:

"John Skinker (colored man)

To the clerk of Fayette county court, Dr.

1828, April, order on producing deed of emancipation to Jacob, 25; order acknowledging same, 25—order to record, 25; recording, 75; order that certificate be granted, 25—order that he is not likely to become a county charge, 25; order taking description, 25,

May—order on producing deed of emancipation to Dorcia, Sr. 25; order acknowledging the same. 25; order to record, 25; recording, 75; order that certificate be granted, 25; order that she is not likely to become a county charge, 25; order taking description, 25,

Same for emancipating Dorcia, Jr. except for recording,

Do.	Susan,
Do.	Marshall,
Do.	Nelly,
Do.	John,
Do.	Elizabeth,
Do.	Ben,

\$2 25

2 25

1 50

1 50

1 50

1 50

1 50

1 50

1 50

1 50

\$15 00

J. C. RODES, Clerk."

Thus the round sum of fifteen dollars seems to have been charged for two deeds emancipating the family of

charge, by a majority of the court.—Judge Nicholas dissenting,—and the fee bills themselves contain evidence of extortion, for which removal from office is the required penalty.

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Occasional erroneous charges in fee bills, such as other clerks are in the habit of making—do not prove corruption or incapacity in the clerk who issues them. But extortion or incapacity may be inferred where the charges are very exorbitant or habitual.—

Though fee bills may appear, upon inspection, to contain illegal charges—as for services unnecessary, and probably never performed, in a case where the penalty, upon conviction, is removal from office, (the records of the court not being used, to show what orders were made) this court will rather presume, that unnecessary orders, which justify the charges of the clerk, were directed by his court, than that he made the charges without performing the service.—In the absence of such evidence, (the order books,) the defendant is acquitted of this holding that the removal from office is the required penalty.

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a colored man. And charges are made for orders which were unnecessary and unusual.

Where excessive charges are so exorbitant or habitual as to prove either wantonness or gross ignorance, extortion or incapacity may be the deduction. Of extortion Coke says, "it is more odious than robbery; for robbery is apparent and has the face of a crime; but extortion puts on the vizard of virtue—and it is ever accompanied with the greivous sin of perjury." According to this definition, has Rodes been convicted of extortion?

Judge Nicholas thinks that he has. It is his opinion that the illegality of the fee bills sufficiently appears on their face; that there is no room for fair presumption, that the county court permitted their record to be encumbered with such a number of absurd and unnecessary orders as would be required to legalize some of the fee bills, and that, if Rodes relied on the actual existence of such orders, it was his duty to have produced them. He further thinks that the great number of illegal fee bills proved to have been issued, through a series of years, showing charges of gross and palpable illegality, altogether and always in his own favor, manifest an inexcusable habit during the time he has been in office; and, therefore, should be deemed sufficient to prevent even mercy itself from putting any other construction upon his conduct than that of deliberate extortion, for for which he ought to be removed.

Upon the second charge, the Chief Justice and Judge Underwood do not concur with Judge Nicholas. They cannot come to a satisfactory conclusion as to the true character of the principal fee bills, without knowing the amount of service which was actually rendered by the clerk. If they should presume that, in many of the cases in which fee bills were issued, no other orders were made by the court, and entered by the clerk on the order book, than such as were necessary and appropriate, they could not doubt, that the charges were grossly illegal. But unnecessary orders may have been made by the court, and entered in an unusual and subdivided manner; and if such orders were made, in such

a form, the clerk had a right to charge for them, as made and entered. They admit, that it may be presumed, that no unnecessary orders were made by the court, and that entire orders were not subdivided on the order book. But it is also reasonable to presume, that the clerk did not violate his official duty wilfully, by charging for orders that had never been made. The clerk, or the court, has erred; but whether the error was in the one or the other, *no proof* in this case enables this court to determine. It was incumbent on the Commonwealth to support her specifications by sufficient proofs. It was not the duty of the clerk to prove his innocence, until sufficient evidence had been produced by the Commonwealth to authorize the inference of his guilt, in the absence of countervailing evidence. He is not guilty unless his charges were unauthorized and clearly illegal. They should not be *presumed* to have been so—they cannot have been so, unless they are contradicted by the record; and this court cannot know, and should not, in a case so highly penal as this, *presume* that the fee bills and the records do not correspond.

Had the order books been produced, and had they shewn, that the clerk had charged for orders that had never been made, Judge Underwood would have decided that the second charge had been supported, sufficiently to require removal on that ground. He, also, is of the opinion, that none of the bundles of fee bills were legal evidence against Rodes, except such as were described in the specifications.

The Chief Justice is inclined to the opinion, that, admitting the illegality of some of the items in many of the fee bills, all the proof upon the second charge would not, when properly considered, be sufficient to convict Rodes of such incapacity, or extortion, as would require his removal from office by the judgment of this court. Here again he thinks that the imposing testimonials which have been given of his good character, and of his general fidelity and rectitude as an officer, should have great effect. Such proof tends to impart the complexion of innocence, mistake, or inadvertence, to acts which, otherwise, might appear to be dark and even

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Upon the trial of a clerk, unless a majority of the judges concur, as well as to the cause for which he should be removed, as in the propriety of such a sentence upon the whole case, he must be acquitted.

criminal; and it should, as he thinks, have some influence in characterizing the conduct of Rodes.

A majority of the court is of opinion, therefore, that the second charge has not been satisfactorily sustained.

Wherefore, as a majority of the court concurs in the opinion, that removal from office ought not to be adjudged on either of the charges preferred in the information, a judgment of acquittal is the consequence of the various opinions of the several members of the court.

And, therefore, it is adjudged and ordered, that James C. Rodes be acquitted of the charges which have been preferred against him, as the clerk of the county court of Fayette.

TRESPASS.

*Keith vs. Johnson et al.*

[Mr. Monroe and Mr. John Trimble for Plaintiff: Messrs. Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR PENDLETON COUNTY.

November 14. Chief Justice ROBERTSON delivered the Opinion of the Court.

The plaintiff in a judg't in detinue may have an ex' on issued for the specific slave or thing recovered: and a tender of the alternate value will not discharge the judgment, unless the plaintiff elects to take it, or the court is satisfied, that, without the defendant's fault, it is beyond his power—the officer must take the *posse comitatus*, if necessary, and seize the

THE facts having been left to the jury, in this case, the only question to be considered by this court, is whether a sheriff, having an execution under the statute of 1828, has a right to make a forcible entry into the defendant's house, to levy it on a slave, for which it had issued, on a judgment in detinue?

The twenty sixth section of the execution law of 1828, (Session Acts, page 159,) has provided, that—"When the plaintiff in detinue shall obtain judgment for any particular slave or slaves, or other thing, the clerk shall, at the request of the plaintiff or his attorney, issue an execution, directed to the sheriff, or other proper officer of any county in the State, commanding such officer to take with him, if requisite, the power of the county, and seize and take into his possession the thing so recovered, and deliver the same to the plaintiff;"—to which is appended



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a proviso declaring, in substance, that the defendant not discharge himself by tendering the alternate valueless the plaintiff shall elect to take it, or unless the plaintiff shall be satisfied that the property, without the defendant's fault, is beyond his power.

If, with such a process in his hands and the *posse comitatus* at his back, the sheriff finds the defendant's door closed, and the slave which he is commanded to take secreted in the house, may he open the door, without the defendant's consent, and enter for the purpose of executing the writ? This question is as novel as it is important and must be solved by analogy and by a proper consideration of the old law, the mischief, and the remedy intended to be afforded by the legislative enactment which has been quoted.

The common law, jealous of intrusion upon domestic peace and security, did not permit an officer to lawfully open an outer door of the defendant's dwelling house for the purpose of executing a *ca. sa.* upon the person or of levying a *fi. fa.* on the goods of the defendant, when the king was plaintiff. Every man's house was deemed his castle, and an ordinary *judicial* writ did not authorize the opening of the outer door, lest the king's enemy might enter; but the officer, once legally in the house, had a right to open an inner door. *3 Inst.* 162; *Dal.* 350. But executions in civil cases, for specific property might have authorized the breaking of the house, and an officer could not otherwise execute the command of a writ. Executions for the specific thing which had been adjudged to be the property of the plaintiff, were of that character; such, for example, as a writ of *seizina* or *habere facias possessionem*; because, *first*, if resisted, the officer could not execute the writ, unless he employed force to overcome the resistance; *second*, the thing must have been judicially ascertained to be the property of the plaintiff, and not of the defendant; *third*, the defendant would be guilty of a contempt of the court, and a forfeiture of his sanctuary, by concealing within his dwelling walls, *that which* he knew not to be his, and which the law had commanded him to surrender to the true owner. Hence, when a writ of *seizina* was resisted, the

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cer had a right to employ whatever force the exigency made necessary to enable him to enter the house, and to turn the defendant out and put the plaintiff in. (5 Co. 91.) Hence too, on a process of *ullagatum*, as the defendant had been guilty of a persevering contempt of the law, the officer had a right to break into the house to execute the writ, either on his person or his goods; and hence also, when a distrainer refused to surrender goods which had been replevied, and attempted to secure them in his house, the officer had right to employ all the force that was necessary to enable him to enter the house, and restore the goods. *Dal. Sher.* 373; 5 Co. 93.

So also, if one man conceals another's goods in his house, the sheriff may break in to levy on them.

To execute a process upon a judgt in detinue, the sheriff could not, at common law, make a forcible entry into the def't's dwelling house.— But now, under our ex'on law of 1828, he may

And it is well settled that a sheriff had authority, at common law, to enter the house of *A* by force, to levy a *feri facias* on the goods of *B*, the defendant in the execution, if *B*'s goods were in *A*'s house. 6 Co. 93; *Sid.* 196.

An execution on a judgment in detinue did not, according to the common law, authorize the officer to enter the house of the defendant by force, because the process was in the alternative, and the defendant might have discharged the judgment by tendering the alternate value; and because also, the plaintiff might have distrained the goods of the defendant, to coerce a surrender of the specific thing which had been adjudged to him, the plaintiff.

But now, since a plaintiff may have a peremptory execution for the thing alone, reason and analogy seem to authorize a forcible entry into the house of the defendant to take the specific property. Some of the reasons that authorized such an entry in virtue of a writ of seizure, a process of *ullagatum*, or to obtain restitution of goods that had been distrained and replevied, apply, with full force, to such a process as may now be issued in detinue. And, if the house of a stranger may be forcibly entered to levy a *feri facias* on the goods of another person who is defendant in the execution, why may not the defendant's house be entered in the same way, in order to levy an execution on property, which has been ascertained by a judgment against him, to be, not his, but the plaintiff's? When a slave has been adjudged to be the property of the plaintiff, and when he elects to

have a process to obtain the specific thing without evasion or alternative, why should not the officer have as much power, under such a process, as he would have under a writ of *seizin* commanding him to deliver possession of real estate to the plaintiff, or as he would have, on the replevin of a distress, to take and restore the identical goods which had been distrained; or as he would have, under a *feri facias* against B, to enter the house of A, and take the goods of B? The common law protects a man's house whilst it has *his own goods* in it; but it does not allow it to be closed upon a process against the goods of any other person; nor does it protect it when the process is issued against a specific thing, which has been adjudged to the plaintiff, in a suit between him and the defendant who has it in possession, and when it is either in his house, or the officer has good reason for suspecting that it is, and on proper demand, is refused admittance.

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But were analogical reasonings inconclusive, the object of the enactment in 1828 should be decisive. The object of that legislative provision was to supply a defect in the common-law remedy in detinue. The chief motive for preferring an action of detinue, is a desire to obtain restitution of a specific chattel for which the owner would be unwilling to accept the estimated value. But, as the common law, by giving an election to the defendant, placed it in his power to frustrate the plaintiff, in his specific aim, the legislature authorized an execution for *the thing alone*, and took from the defendant (at the plaintiff's option,) his common law right to substitute the alternate value. The remedy provided by the act of 1828, was intended to be effectual; and such an interpretation should be given to the statute, as to insure the effectual attainment of the end which was contemplated. But, if a perverse defendant may still close his doors against an officer holding such a process as that authorized by the statute, and thus put him at defiance, the common law has been but little, if at all, amended or improved; and the *posse comitatus*, which the officer is directed to take with him in the first instance, if he shall apprehend resistance, would only convert the proceed-

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ing into a humiliating farce, and swell the triumph of a contumacious party over the power and majesty of the law. If the officer, with his county at his heels, should be obstructed by a lock or a latch, must he desist, and lie, with *his army in wait*, around the house, watching an opportunity to enter the "*fortress*" by stealth, and thus be compelled either to subject the family to alarm and to seige, or to succumb to the perverse defendant, and exemplify the impotency of the law? Why take the *posse comitatus* unless it be to overcome all lawless opposition?

The twenty sixth section of the act of 1828 authorizes the employment of the power of the county before resistance, for the writ which that section prescribes, commands the sheriff to take the *posse comitatus* "if requisite:" that is, if he shall deem it necessary to insure the execution of the writ. He is not to wait until he finds resistance, because, if he should do so, he may be frustrated, and because, had any such precaution been contemplated, there would have been no meaning in so much of the statute as directs that the execution shall command the sheriff to take with him the *posse comitatus*; for, without such authority, he would have had the right to do so after finding resistance. This is an additional circumstance tending to shew that an effectual remedy, which should not be eluded or baffled by any means which force could overcome, was intended by the legislature. The contemplated end cannot be attained, if the sheriff cannot open the door of the defendant's house to seize a slave which he is commanded to take, and which the defendant, by an abuse of his privilege, is endeavoring to conceal, in contempt of a solemn judgment, and in defiance of the law.

If the officer be refused admittance into the house, and the slave be then there, or he have good reason for believing that it is, he has a right to enter by force to execute his writ.

Wherefore, as the instructions of the circuit court accorded in principle and effect with the doctrine of this opinion, and the verdict and judgment were sustained by the law and an allowable deduction from the facts, the judgment is affirmed.

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1883.

## Marshall vs. Peck and Gilman.

COVENANT.

[Messrs. Wickliffe and Wooley and Mr. Chinn for Plaintiff: Messrs.  
Morehead and Brown for Defendants.]

FROM THE CIRCUIT COURT FOR FAYETTE COUNTY.

Chief Justice ROBERTSON delivered the Opinion of the Court.

May 18.

THIS case was decided at the last Spring Term. But soon after the Opinion was delivered, the court was informed, that Mrs. Gilman, one of the defendants, had previously departed this life; upon which her death was suggested upon the record, and a *suspension* of the opinion and decision ordered. The case again coming up, in the call of the docket, at this term, and it appearing that no administration had been granted of the estate of Mrs. Gilman, and that, it was not likely that there would ever be any personal representative, against whom there could be a revivor, the matter of abatement was further considered; and the court held, that, as Peck and Gilman were sued jointly, *ex contractu*, and obtained a joint judgment against Marshall, for costs—the right to collect those costs, survived to the survivor, Peck; and consequently the writ of error did not abate by the death of Mrs. Gilman. The order suspending the opinion and decision, was, therefore, now set aside.

If two, or more persons are sued jointly, *ex contractu*, and obtain a judgment in bar, and for their costs—upon which a writ of error is prosecuted—if one of them dies (the right surviving) it does not abate the writ of error.

November 14.

Marshall brought an action of covenant (jointly,) against Peck and Gilman, on the following writing:—

"I promise to pay Lewis Marshall one thousand and seventy five dollars in Commonwealth's Bank notes, in manner following: two hundred and sixty eight dollars seventy five cents in four months; the like sum each four months thereafter until the whole is paid; the whole sum to bear interest from the date. Witness my hand this 1st June, 1827."

(Signed) John Peck.

"I, Mary Gilman, guarantee the full performance of the above contract."

(Signed) Mary Gilman.

The defendants demurred to the declaration, and filed two pleas in bar: 1. that "the covenant was executed without any good or valuable consideration:" 2. a special plea, averring, in substance, that Marshall sold to Peck and to James Graves, a share in the stock of "a supposed invention" for manufacturing hemp, which he in-

Joint action on a note, and separate guarantee. The note.

The guarantee.

Demurrer and pleas in bar.

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circuit court—  
and,

Questions here.

A note, or other contract, signed by one person, and a guarantee of the payment, or performance, annexed thereto, and signed by another person, are separate contracts—upon which no joint action can be maintained.

duced them, by "*false representations*" as to its utility and probable results, to believe to be of immense value; that the covenant was given in consideration of a part of Peck's half of the price for the share, and for no other consideration; and that, afterwards, a full experiment resulted in proving that the "invention and stock" were of no value whatsoever.

The court overruled the demurrer to the declaration, and also overruled demurrers to the pleas; and thereupon, issues were concluded on the pleas, and verdict and judgment were rendered in bar of the action.

Two questions are presented by the record: *First*, is the declaration good? *Second*, did the circuit court err in instructing the jury?

*First.* Mary Gilman and John Peck were not joint covenantors. She was no party to his covenant. She did not undertake as an ordinary surety. She did not, as a co-party, covenant to pay the money which he undertook to pay, or as he agreed to pay it. His covenant was single, and binding on himself alone. She did not covenant to pay Commonwealth's notes on the days stipulated by him; but agreed only to be responsible for his defalcation. A guarantee imports, *ex vi termini*, a collateral undertaking. It is, though a concurrent, only an accessory agreement, distinct from a principal contract of which it assures performance by the primary undertaker, or indemnity for his failure to perform. The two agreements, though separate and distinct, are usually commensurable and simultaneous. But there can be no breach of the guarantee until after a non-performance of the principal agreement. Mrs. Gilman's covenant is as distinct from Peck's as it would have been had they been written on different papers, or signed and delivered at different times. He could not be sued on her covenant of guarantee. She cannot be sued upon his. The two agreements cannot be so blended as to constitute but one, binding equally and alike on her and him. They are not identical, and, therefore, cannot be joint. 1 *Wheaton's Selwyn*, 35; *Leonard vs. Vridenburgh*, 8 *John*. 29; *Ely vs. Bibb*, 4 *J. J. Mar.* 71. The guarantee is an entire and individual agreement, not a constit-

uent part of Peck's contract, though it may be deemed a "branch" from it. Each is sole and complete *by itself*; and there could not have been a simultaneous breach of both. A joint action cannot, therefore, be maintained against Peck and Gihnan. She did not undertake to pay; but only covenanted that he would punctually do what he had undertaken. *She* can be sued on her guarantee only, and he upon his separate covenant.

Wherefore, it seems to this court, that the circuit court erred in overruling the demurrer to the declaration.

If the special plea should be deemed a plea of failure of consideration, it would not be good, because, as the consideration was executed, if any binding consideration ever existed, it did not fail in consequence merely of the unproductiveness of the stock. But, as the facts alleged in that plea were substantially proved, and there was an issue on the general plea of "*no consideration*," whether or not the proof authorized the deduction that there had been no consideration, is the only material enquiry.

The circuit court instructed the jury that, if they believed, that the sale of the share in the invention was the only consideration of the note, and that the invention was of no value, they should find for the defendants.

The instruction left the jury free to enquire whether there was any other consideration than the sale of a share in the invention, and consequently, this court need not determine whether the proof shewed that an interest in machinery, or any other thing, formed a part of the consideration.

Neither of the pleas imputes fraud. The simple allegation that Marshall made *false* representations as to the *value* of the invention, does not amount to an imputation of fraud: *Simplex commendatio non obligat*. A false affirmation, respecting a matter (such as *value*) which Peck had an opportunity of ascertaining for himself, by ordinary vigilance or by enquiry, could, *per se*, have no effect on the legal rights of the contracting parties, even had such affirmation been made with an intention to deceive. In such a case, "*caveat emptor*" would effectually operate.

It appears that, prior to Peck's purchase, the stockholders had made some experiments with imperfect ma-

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A plea of a *failure* of consideration would not be good when the consideration (such as it was,) was executed.

Instruction.

False representations by the seller, as to the *value* of a commodity, or as to any matter that the buyer can ascertain by ordinary vigilance or enquiry, do not subject the seller to any legal liability

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chinery, which encouraged them, or some of them, to entertain an opinion, that the invention would prove to be of great utility; that Marshall expressed an extravagant opinion of its value to Peck; that specimens of some of the experimental fabrics were exhibited, and that Peck had seen the machinery in operation, and examined it before he closed the negotiation for the purchase, or rather before he ratified an initiative contract, which had been made for him in his absence.

Wherefore, whether we consider the special plea, or the proof, neither the erroneousness of Marshall's opinion, nor the falsehood of his affirmation, as to value merely, can be deemed material. See 1 *Wheaton's Selwyn*, 484; *Bayly vs. Merritt*, Cro. Ja. 386. *Perry vs. Aaron*, 1st *Johnson's Reports*, 129; *Bayard vs. Malcom*, 2 *Ib.* 50; *Holden vs. Dakin*, 4 *Ib.* 421; *Davis vs. Meeker*, 5 *Ib.* 354; *Sands vs. Taylor*, *Ib.* 395; 2 *Com. on Con.* 265.

Proof of fraud is inadmissible, where there is no plea charging fraud.

And if there had been vitiating fraud, as neither of the pleas charges such fraud, proof of facts tending to establish it would have been inadmissible. *Davis vs. Young*, 1 *Mon.* 384.

In the sales of commodities, there is, in general, no implied warranty of soundness, quality or value.—Sales of provisions, medicines, and sales by sample, are exceptions. There is an implied warranty in all sales, that what is sold exists.—susceptible of being transferred; that the seller (if in possession) has a good title; that a negotiable note sold, is genuine. If there is a failure in either of these points, the consideration paid may be recovered back, by assumpsit.

As, then, the only issue was, whether or not there was any valuable consideration, the instruction of the circuit court cannot be objected to, unless its principle be false; or, in other words, unless the court erred in assuming, as it did in the instruction, that, if the "stock or invention" was, in fact, of no value, there was no binding consideration for the covenant. As already suggested, we shall consider the instruction, as thus stated, without enquiring whether there was proof of any other consideration.

In the opinion of this court, the assumption in the instruction, whether it be considered in the abstract, or in reference to the proof, was erroneous.

The civil law maxim—that a sound price draws after it the implication of a warranty that the thing for which it was given is also sound or valuable—has never, since the days of Lord Mansfield, been admitted to be a doctrine of the common law.

According to the principles of the common law, there is no implied warranty of soundness, quality, or value—



except in a few classes of contracts which are regulated by peculiar reasons of policy; such, for example, as sales of provisions or medicines, and sales by sample. (See the cases, *supra*.)

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Whenever it is ascertained that there was no valuable consideration for a sale, or that the consideration had failed, *indebitatus assumpsit* may be maintained for any money which had been paid on the contract to the vendor. See 2 *Com. on Con.* from page 51 to page 83 inclusive, and the cases therein cited.

But we have not seen any case in which, without either fraud or warranty, express or implied, such an action was maintained upon the ground that the thing for which the money had been paid, was in fact of no value. There must be an actual subject matter, legally susceptible of being sold; and generally there is an implied warranty that the subject of the contract has existence. If the vendor be in possession at the sale, a warranty of title or right to sell will be also implied; and in sales of negotiable paper, there is an implied warranty that the paper is genuine. *Markle vs. Hatfield*, 2 *Johnson's Repts.*, 459; *Breed vs. Cook et al.* 15 *Ib.* 241. But the value of the thing sold, whatever it may be, depending, as it always must, upon accident and opinion, is contingent and speculative; and the simple act of selling will not render the vendor responsible for the value of that which he sold and had a right to sell. It is not the *actual value*, but the *prospect of gain* to the buyer and of correspondent *loss* to the seller, that forms the essence of the true consideration of a contract of sale, without warranty, of a proper subject matter of contract which the seller has a right to sell, and which *may be, and is deemed to be, of some value at the date of the contract*. Thus, if the owner of a promissory note sell it (in good faith,) without either an assignment or an express warranty, he may recover the promised price, even though the obligor was insolvent, and the note was not, in truth, worth one cent. *Triplett vs. Holly*, 4 *Littell's Repts.*, 130; *Clark vs. Muddell*, 1 *Salk*, 124; *Bank of England vs. Newman*, 1 *L'd. Raym.*, 442; *Hartop vs. Hoare*, 3 *Atk.* 50; *Breed vs. Cook et al*, *supra*, 1 *Com. on Con.* 14. In such a case; as the

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note *might* have been valuable, and so seemed to be, and as its value was uncertain, the prospect or chance of its productiveness was a sufficient consideration in fact and in law; because, under such circumstances, the note should be deemed to have been of some *adventitious* or *vendible* value to the owner, though it was *afterwards* found to have been of no *intrinsic* value; and, therefore, he should not be deprived of the right to make what he could out of it, by selling it, whilst he considered it of any value whatever.

The vendor of a horse, without warranty or fraud, will not be responsible to the vendee, even though the horse was so diseased at the date of the sale as not to have been worth any thing.

A vendor of bank stock would surely not be legally liable to the buyer, merely because subsequent disclosures prove that, at the time of the sale, the stock was worth nothing; unless he had been guilty of some fraudulent suggestion, or suppression of a material fact, respecting which it was his duty to make a frank and true communication.

And we presume that, even in the days of South Sea visions, a *bona fide* vendor of stock in the memorable South Sea Company, could not have been legally precluded from recovering the promised price, upon proof merely that the whole scheme was afterwards blown up as an empty bubble, and that, therefore, the stock was not worth a cent at the date of the sale. Such stock actually existed, was vendible, and was sold to the ruin of many vigilant men, all of whom were voluntary adventurers in an unknown ocean of speculation. The visionary prospect of amassing inammoth fortunes operated as a powerful incentive, and the illusion was exposed, only by an explosion that shook the commercial world. But opinion imparted to the South Sea stock a fictitious value, inflated by the very obscurity and remoteness of the scheme of operations, greatly beyond the limits of sober and rational calculation. The stock was, in fact, worth nothing, and the whole scheme, magnificent as it was, eventuated as an abortion. Nevertheless, we are not acquainted with any authority, or principle of law, which

would have exonerated a purchaser of such stock from his obligation to pay the price stipulated by a *bona fide* contract of sale, in "*Exchange Alley*," or elsewhere. As there was such stock, a sale of an interest in it, was a sufficient legal consideration, when both buyer and seller acted in good faith, and on their own speculative opinions, as to the productiveness of the stock and the contingent value of an interest in it.

A man's intellect is his best property, and every one has a natural and inviolable right to appropriate to his own use, the productions of his own industry and the conceptions of his own genius. What is such an original and practical conception, as to be entitled to the denomination of "*an invention*," may sometimes be an abstruse metaphysical question. But there can be no doubt that a *distinct* and *organized* mode of operation, essentially differing from any preexisting contrivance, in adaptation or design, and which may be applied to any useful or practical end, should be deemed an invention which may belong to the projector; *may* be valuable, and, therefore, *should* be vendible. Sound policy requires that such things should be fit subjects of obligatory contract. The right to sell even the chances incident to an invention, before its practical utility shall have been fully developed, stimulates the inventive energy, and may enable genius to surmount the common obstacles—want of money, and want of friends, and to consummate an important design by means derived from the co-operation of others, who may choose to expend their capital (whether money or labor,) for the prospect of advantage to themselves individually or society generally. To patronage and success, resulting from such means, mankind are, in no small degree, indebted for some of the most useful achievements of genius: for example, the printing press; the magnetic needle; the steam engine; the discovery of America—itself a new world. If the project fail, the projectors lose the capital expended in experimenting; if it succeed, *they* gain, and perhaps both fortune and fame. Such a *prospect* is a fair, legitimate and valuable consideration for the expenditure of money, of labor, or of talents.

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An invention is a fair subject of sale. And if what has been sold, in good faith, as such, is in fact an invention, its utility being matter of opinion, contingent, speculative, the transfer of the right to it, is a sufficient consideration to uphold the contract for the price, however useless and worthless the invention may prove to be.

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Whether the thing sold as an invention was so, or not, is a proper question for a jury.

Whether, in this case, there had been any invention, was a question for the jury to decide, and which was not concluded by the instruction from the court. If, as the facts conduced to prove, there was an invention, and Marshall held such an interest in it as that which he sold to Peck, and made the sale in good faith, the transfer of that interest to Peck was a legal and valuable consideration, even though the inutility of the invention, and consequent unproductiveness of the stock, were afterwards experimentally ascertained. If the invention had succeeded, according to the sanguine, but delusive, hopes of the parties, and had yielded to Peck a fortune, the gain would have been his: the correspondent loss Marshall's. Wherefore, as reciprocity is justice, the abortion should result to Peck's loss, and Marshall's gain.

If there was a thing sold, and the sale was uninfected with fraud, the value of the subject matter of the contract is not material to the question of legal liability.— *There was a consideration.* What a chancellor might do, or what a jury might be allowed to do, upon a thorough trial, or upon a different issue, this court cannot know or now say. But, presented as the case is by this record, it seems to us, that the circuit court erred in its instruction to the jury.

Where a joint action is bro't against several, who are only liable *separately*, and they obtain an erroneous judgment in bar, that would preclude plaintiff in another

As the judgment against Marshall, on the merits, would bar a separate suit against either of the covenantors, it must be reversed, although he committed the first error in bringing a joint action.

Wherefore, the judgment of the circuit court is reversed, and the cause remanded, with instructions to sustain the demurrer to the declaration.

suit, it will not be affirmed, because of his *first error* in pleading; but will be reversed, and remanded for new proceedings commencing with that first error.

# INDEX

TO

## THE PRINCIPAL MATTERS

IN THIS VOLUME.

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### ABATEMENT, AND REVIVOR.

1. A plea in abatement, *in chancery* does not have the effect of dismissing the bill absolutely. If it be pleaded in abatement, *in chancery*, that the complainant is a non-resident, and has not given security for costs, he may give the security, *nunc pro tunc*, and avoid the effect of the plea. *Haskins &c. vs. Spiller*, 176.
2. That the defendant in a writ of right is not tenant of the freehold, is matter of abatement only. *Sanders' heirs vs. Buskirk*, 411.
3. A writ of right abates in the circuit court by the death of a party, and there can be no revivor. But an appeal or writ of error, prosecuted to reverse a judgment on a writ of right, and abated by the death of a party, may be revived and prosecuted by his legal representative, or by a co-party. *Sanders' heirs vs. Buskirk*, 412.
4. If two or more persons are sued jointly, *ex contractu*, and obtain a judgment in bar, and for their costs—upon which a writ of error is prosecuted, if one of them *dies*, (the right surviving,) the writ of error does not abate. *Marshall vs. Peck and Gilman*, 609.

### ACCORD AND SATISFACTION.

1. A note given for a debt secured by a previous similar note, which had become due, is no satisfaction of the debt. But if the parties to the new note are different, it may be pleaded as an accord and satisfaction. *Letcher vs. Bank of the Commonwealth*, 84.

### ACKNOWLEDGMENT OF DEEDS.

See *Conveyances*, 20, 21.

### ACTION.

1. An action may be maintained against a corporation, upon a liability imposed by the statute by which it is established, or which results, by implication of law, from its acts, or upon a judgment. *Blanchard vs. Maysville and Lexington Turnpike Company*, 87.

## ACTION.

2. *Debt* is the appropriate action to recover of a corporation, the damages, allowed by a jury, according to law, to the owner, whose land has been taken for the road of a corporation. *Blanchard vs. Maysville and Lexington Turnpike Company*, 91.
3. *Assumpsit* will not lie against an agent, who received the money to which a stranger was entitled, and without knowing of the stranger's right, paid it over to his principal—for the law will not *imply a promise* to pay, where there was no knowledge of the right to receive.—*Pool vs. Adkisson et al.* 117.
4. *Detinue* may be maintained against a defendant who has had possession of the chattel sued for, but *has parted with the possession* (without being divested of it by authority of law,) *before the date of the writ.* *Pool vs. Adkisson et al.* 118.
5. *Trespass, trover, or detinue*, will lie against him who carries away and sells the property of another without his assent. *Pool vs. Adkisson et al.* 121.
6. *Assumpsit* lies against the owners of a steam boat in favor of the injured party, for a breach of a contract of affreightment made by the master. *Trespass* on the case, for damages resulting from a breach of duty. *Bell et als. vs. Wood*, 147.
7. The owner of the goods has the right of action, in form, *ex delicto*, or *ex contractu*, as the case may be. *Ibid*, 147.
8. When a judgment has been recovered against a party to a bill of exchange, or note, no other action can be maintained against the same party on the same bill or note. If one under a subsequent liability (as indorser,) on such bill or note, pays it, his remedy, against the party who had been sued, is on the *implied assumpsit*, or by taking the control and use of the judgment. *Clark vs. Schwing*, 336.
9. The right to have an erroneous judgment revised and corrected, never dies with the party, but survives to his representative, notwithstanding the cause of action upon which the judgment was rendered, would not have survived. *Sanders' heirs vs. Buskirk*, 413.  
See *Dower*, 6.—*Consequential damages*, 1, 2.—*Joint and several undertakings and liabilities*, 1, 2, 6.—*Pleas and Pleading*, 7, 8.

## ADVANCEMENT.

1. Advancements *in slaves* are not to be brought into hotchpot in the distribution of *personally*, nor *vice versa*. But advancements *in land*, or slaves, or both, should be brought into hotchpot in the *division* of either, or both. *Stone's reps. vs. Halley*, 198.
2. Distributee may waive his right to distribution, and retain his advancement. *Stone's reps. vs. Halley*, 199.
3. A testatrix, in making a bequest to her son; used language showing her expectation, and reason for the bequest, to be, that an advancement made by her husband to the son, would be brought into hotchpot: held, that, he could not claim the legacy and retain the advancement too. *Stone's reps. vs. Halley*, 199.

## AFFIDAVIT.

See *Negroes*, 6.

## AGENTS.

1. A power of attorney authorizing the agent to sell, vests no title in him. *Beatty vs. Judy &c.* 102.
2. Any person who *has had* the possession of, and has sold, used, or detained, the property of another—either for himself, or as the agent, or servant, of a stranger—is liable (in *detinue*) to the true owner, for the

## AGENTS.

- property, or its value—whether he was, or was not, cognizant of the right of the true owner—and whether he had, or had not, parted with the possession before the suit. *Pool vs. Adkisson et al.* 111.—Different opinion, and argument, of Judge Underwood, 121—142.
3. The authority of an agent can never exceed that of the principal. No one can confer upon another a power which he does not himself possess; or authorize another to act illegally. Whoever, being of legal discretion, acts *tortiously*, or intermeddles with the property of another without his assent, or the authority of law, is personally responsible to the injured party:—and the fact that it was done as the agent, or by the request or command, of a third person, will not excuse. *Pool vs. Adkisson et al.* 112.—Judge Underwood dissents, on the latter branch of the proposition, 121—142.
  4. Purchaser of a chattel, from one in possession, who had no title, nor authority to sell, is responsible for the value, to the true owner. *Pool vs. Adkisson et al.* 115.
  5. An agent, who sells a chattel for one who had no right to it, and is made responsible to the owner, must look to his employer, for indemnity. *Pool vs. Adkisson et al.* 115.
  6. Assumpsit will not lie against an agent, who received the money to which a stranger was entitled, and without knowing of the stranger's right, paid it over to his principal—for the law will not *imply a promise* to pay, where there was no knowledge of the right to receive. *Pool vs. Adkisson et al.* 117.
  7. Master of a steam boat, his contracts—See *Contracts*, 10, 11, 12.
  8. Statement of an agent, after the transaction, not evidence against his constituent. See *Evidence* 19, or *Davis vs. Whitesides*, 177.
  9. Commissioner selling more land than he was authorized by the order to sell. See *Sales* 3, or *Blakey vs. Abert*, 185.
  10. A deed transmitted from abroad to an agent in the county where the land lies, to be there recorded, takes effect, by delivery, as soon as it is lodged in the clerk's office—the assent of the agent to its being recorded, not being essential. *Daniel vs. Bratton et als.* 210.
  11. If an agent sign his own name, with *descriptio personis* added, (as J. T. J. attorney in fact for J. J.) to a bond for a conveyance: though this is but the bond of the agent, yet, if he was authorized to bind the principal, the latter may be held, *in equity*, to a specific execution. *Johnson &c. vs. W. Johnson's heirs &c.* 368.
  12. It is the duty of an agent to inform his principal of his proceedings.—One receives land warrants, a moiety of which is assigned to him, to locate them on shares, and sell the land: having done so, he should inform the party who furnished the warrants; and if, without giving that information, he buys the other half of the warrants for less than the value of the land, he shall, nevertheless, account for its full value at the time he sold it. *Taylor vs. Knox's Ex'ors.* 395.
  13. If the vendee of land loses it, he may recover of his vendor, the nominal amount of the consideration, although it was paid in property at an exorbitant price.—But this rule does not apply to an agent who by taking property in payment, on his own account, sells the land of his principal at a high price: he shall account only for the fair cash value of the land, with interest from the time of the sale. *Taylor vs. Knox's Ex'ors.* 396.
  14. An agent is entitled to interest on advances made, in transacting the business of the principal. *Taylor vs. Knox's Ex'ors.* 399.
  15. The advances, commissions and charges of an agent making sales, should be deducted from the proceeds—decree for the balance. *Taylor vs. Knox's Ex'ors.* 399. See *Interest*, 6.

**AGREEMENT.**

1. An agreement, to waive a defence contained in an answer, made under the mistaken idea that the adverse party conceded an equivalent, was properly set aside by the chancellor, upon the hearing. *Todd and others vs. Wheeler and others*, 401.

**AMENDMENT.**

1. After judgment reversed and cause remanded, the plaintiff may obtain leave to amend his declaration, so as to conform to the proof. *Cain et al. vs. Flynn*, 144.

**ANSWER IN CHANCERY.**

See *Practice in Chancery*, 6, 10, 23, 24, 26, 35, 37, 39, 40. *Practice in suits at Law*, 21.

**APPEAL.**

1. An appeal should not be dismissed for a defect in the appeal bond, provided the appellant will forthwith give a new and sufficient bond. *Bates vs. Courtney's Adm'r.* 145.
2. New bond may be given *repeatedly*—whenever the existing bond is declared defective. *Ibid*, 145.
3. Clerk's duty to prepare an appeal bond—party should not be prejudiced by his error. *Bates vs. Courtney's Adm'r.* 145.
4. Any one of several against whom a decree, or judgment, is rendered, may appeal. Such appeal brings up the whole case, and the appellant is liable for the whole, by his appeal bond. Otherwise in a *Writ of Error*—See that title, 1. *Johnson &c. vs. W. Johnson's heirs &c.* 366.
5. No appeal lies on an order discharging a party, who was bound to keep the peace, appears, and is discharged without further security. *Commonwealth vs. Oldham*, 463.
6. An appeal granted, becomes a nullity upon a failure to give the appeal bond as required; and will not be considered in this court. *Wickliffe vs. Clay*, 589.

**ARBITRATION AND AWARD.**

1. Two suits were referred to arbitrators; by a subsequent order, in terms embracing *only one* of the suits, one of the arbitrators was superseded; the substitute and his colleague returned an award *on both suits*: held that the award was invalid, as but one suit was referred to these arbitrators. *Grimes vs. Grimes*, 234.
2. An agreement of reference (under the statute) must state the dispute, or suit, referred; and the power of the arbitrators is restricted to the matters included in the statement. *Grimes vs. Grimes*, 234.
3. Extraneous evidence is not admissible to shew what the parties agreed to refer; it should appear by the record. *Grimes vs. Grimes*, 234.
4. An award must be final, certain and conclusive, or it may be set aside. *Coghill et al. vs. Hord*, 351.
5. Award, that a party shall have land secured to him, or have its value in money, at his election: this is not certain and final. The time in which to make the election should have been limited, and the value of the land in money, ascertained. *Coghill et al. vs. Hord*, 351.
6. An award that leaves any thing for future adjustment, (otherwise than by computation or measurement) cannot be sustained. *Coghill et al. vs. Hord*, 351.
7. Several claims being referred, by a general submission, an award for plaintiff for one or more, silent as to the others, will be taken to be against him, as to the latter. *Engleman's Ex'ors. vs. Engleman*, 439. See *Evidence*, 30.

**ARGUMENT OF COUNSEL.**

Of the right to open and conclude—See *Practice in Suits at Law*, 24.



# ASSETS.

See *Executor and Administrator*, 1, 2, 9, 13.

# ASSIGNMENT.

1. If the holder of an endorsed note fail to use all and each of the ordinary remedies, direct or collateral, to coerce payment from the maker, the endorsers will be exonerated; and although the holder afterwards obtain payment from his immediate assignor, the latter, nevertheless, loses his right against his assignor, by the laches of the holder. *Johnson vs. Lewis*, 182.
2. "Due diligence" in pursuing a principal obligor, for the recovery of the debt, before having recourse to the assignor, or endorser, is a question of law. *Johnson vs. Lewis*, 183.
3. If the holder of an assigned obligation attempts to pursue the obligor to insolvency, and in the course of the proceeding, an officer so conducts as to render himself liable for the debt, the holder of the obligation must avail himself of his rights against the officer, before the assignor will be responsible. *Johnson vs. Lewis*, 184.
4. The defendant, in an action upon an assigned writing, cannot require proof of the assignment, without an oath that he believes it is forged; and his plea, having that effect, may be rejected, for want of the oath. *Jones vs. Cromwell*, 385.
5. If the want of a sufficient assignment is relied on, the defendant should crave oyer of the writing and assignment; and if none be shown, the plaintiff fails; if an insufficient one, it is ground of demurrer. *Jones vs. Cromwell*, 385.
6. One bound to convey land may be exonerated, by an agreement to rescind, or by a decree and sale of the land to pay the consideration. But no such proceeding after he has notice of the assignment of his bond, will affect the assignee's rights. *McDonald vs. Ford*, 465.
7. The plea of a covenantor sued by an assignee, must show the facts pleaded occurred before notice of the assignment. *McDonald vs. Ford*, 465.
8. A writing containing mutual covenants is not assignable by law, and the transfer passes only the equitable right. *Wickliffe vs. Clay*, 594.

See *Parties to suits in Chancery*, 12, 13.

# ASSUMPSIT.

See *Action*, 3, 6, 8.—*Payment*, 5.—*Evidence*, 29.—*Judgment*, 2.

# ATTACHMENT—of a debtor's chose in action.

See *Fraud*, 13.

# ATTORNEY AT LAW.

Attorney for the Commonwealth—See the next title.

1. The attorney who recovered the judgment may receive the money; and and the sheriff will be justified in paying it to him. *Canterberry vs. Commonwealth*, for &c. 416.
2. If the creditor reside not in the county, the sheriff, (though he may pay it to the attorney,) is not bound to pay it to any one who does not produce an authority in writing from the creditor, for receiving it. *Ibid*, 416.
3. Contracts between attorneys and their clients, are viewed with suspicion; and conveyances between them have been set aside, upon the idea that the lawyers might, and probably did, take advantage of their situation to procure them. Contracts made after the lawyer's services are completed, are not liable to this objection. Nor should the chancellor interfere, in any case, unless it appears that the lawyer has, in some way, taken an undue advantage of his station, or influence, in making the bargain. *Bibb vs. Smith &c.* 582.

## ATTORNEY FOR THE COMMONWEALTH.

1. Case of two parties claiming the office of Commonwealth's Attorney.—*Bruce vs. Fox*, 447.
2. The court of appeals has jurisdiction to revise the judgment of the circuit court, upon the motion of a party, asserting his appointment to the office of attorney for the Commonwealth, and moving for leave to take the oaths of office, and enter upon the duties. *Bruce vs. Fox*, 448.
3. A Commonwealth's attorney, duly appointed, has a right to hold his office during good behavior and the continuance of his office. *Bruce vs. Fox*, 452.

See *Office and Officer*, 1, 2, 3.

## BAILMENT.

1. *A bona fide* bailee in possession, may not be liable without a demand and refusal; but the liability would result from any appropriation of the thing bailed, *tortious*, in law, in regard to the owner. *Pool vs. Adkisson et al.* 117.

See *Innkeeper*, 1.

## BANK-NOTE CONTRACTS AND LIABILITIES.

1. A creditor having agreed to take commonwealth's paper for his specie debt, and the debtor having failed to pay (or prove a tender,) until the paper had risen in value, the debtor is not entitled, in equity, to any allowance for the advance in the price of the paper; nor to be exempt from the accruing interest on the debt. *Shackleford vs. Helm &c.* 338.
2. The act, of 1827, authorizing judgments for the nominal amount in bank notes, against officers who have collected such money, and failed to pay it over, does not apply to their sureties; the recovery in a suit where they are included, can be only for the value of the paper when it ought to have been paid, and interest on it. *Canterberry vs. Commonwealth*, 418.
3. Where the recovery is in specie, for a debt due in paper, there must be evidence of the value of the paper, or the verdict cannot be sustained. *Canterberry vs. Commonwealth*, 419.

## BANK OF THE COMMONWEALTH OF KENTUCKY.

1. Where a bank discounts a note for the purpose of renewing a former loan, *in the usual way*, the negotiation seems to be equivalent to a new loan, and an independent payment of the old debt—not merely giving one note as satisfaction for another. *Letcher vs. Bank of the Commonwealth*, 84.

See *Mortgage*, 1.

## BANK OF KENTUCKY.

See *Bills of Exchange*, 1.

## BAR—by former decision.

1. A junior mortgagee, made party to the bill of the elder, for a foreclosure, and *failing to defend*, will be barred. *Cooper &c. vs. Martin &c.* 27.
2. An attempt at law, to plead and rely on matters insufficient, will not bar relief in equity on the same matters. *Burchet &c. vs. Faulkner &c.* 100.
3. The dismissal of a bill *absolutely*, by a court which had no jurisdiction in the case, is no bar to another suit. *Lanaster vs. Lair*, 109.
4. A judgment in an action at law, upon a covenant, will not bar a suit in chancery for the specific performance of a stipulation of the same contract, to convey land, where it is made manifest, that the failure, though assigned among other breaches, was not investigated, nor any damages assessed therefor, in the trial at law. *Givens vs. Peake*, 225.
5. Proper mode, in chancery, of setting up a bar by former decision, is by answer. *Givens vs. Peake*, 226.

**BAR**—*by former decision.*

6. A motion to set aside a sale, overruled, will not preclude a party from showing that the sale was fraudulent and void, upon other grounds, not contained in the notice, nor attempted to be proved on the trial of the motion. *Sanders' heirs vs. Buskirk*, 411, 412.
  7. Matters which have been tried and determined at law, cannot be reheard in chancery. *Price &c. vs. Boyd &c.* 435.
  8. The dismissal of a bill framed for one object, *e. g.* to compel one of the defendants to surrender property belonging to the other—will not bar another suit, on the same equity, framed for a different object, *e. g.* to subject the defendant's *choses in action*. *Price &c. vs. Boyd &c.* 436.
- See *Evidence*, 30.—*Arbitration and Award*, 7.—*Practice in Chancery*, 39.—*Practice in the Court of Appeals*, 31.

**BARON AND FEME.**

See *Husband and Wife*.

**BASTARDY.**

1. County court may compel the father of a bastard child to give bond and security for its maintenance.—But has no power to render judgment against a putative father without a trial, and proof of the charge; or to order execution, or give judgment, for the instalments, (before bond forfeited,) on the order for maintenance. *Wilson vs. Wilson*, 98.
2. A surety in the recognisance for the appearance of one charged as the father of a bastard, incurs no liability for its maintenance—upon failure of the principal to appear, the recognisance is forfeited, as to him and the surety, and both are liable for the penalty. *Wilson vs. Wilson*, 98.

**BILL OF EXCEPTIONS.**

1. Where the bill of exceptions does not exhibit *all* the proof, this court cannot say that the verdict was contrary to evidence. *Norton et al. vs. Sanders &c.* 14.
  2. Exceptions to decisions of inferior courts, should be taken, as the decisions, respectively, are rendered—though the right being reserved, they may be written out and signed at any time during the term. *Force vs. Smith*, 151.
  3. But—If a bill of exceptions, signed after the trial, uses the present tense, ("excepts") implying that the exception is *then* first taken, still if it be signed without objection from the adverse party, it will be presumed, in the appellate court, that the right was reserved. *Ibid*, 151.
- See *Practice in the Court of Appeals*, 8.

**BILLS OF EXCHANGE.**

1. The assignment of a note to the Bank of Kentucky, is *prima facie* evidence of its having been discounted, and thereby placed on the footing of a bill of exchange. *Clark vs. Schwing*, 334.
2. A bill of exchange is a simple contract, and the liabilities upon it may be barred in five years. *Clark vs. Schwing*, 335.
3. Bills of exchange and endorsements on notes are not within the act of 1812, placing certain unsealed writings on the same footing with those that are sealed; and actions on them are subject to the bar by the statute of limitations. *Clark vs. Schwing*, 336.

**BONDS.**

Clerk's official bond—See *Clerks of Courts*, 11.  
 Bond, of an Administrator—See *Executor and Administrator*, 11.  
 Bond, gratuitously given—See *Equity*, 10.  
 Bonds for costs—See *Costs*, 2, 15.

**BREACH OF GOOD BEHAVIOR IN A PUBLIC OFFICER.**

See *Clerks of Courts*, 5 to 12 inclusive.

**BUILDINGS.**

See *Improvements on Land*, 1, 2.

**CASE, action on.**

See *Action*, 6.—*Consequential Damages*, 1, 2.

**CHALLENGE TO FIGHT.**

See *Duelling*, 1; 2.

**CHAMPERTY.**

1. Sales of land, by authority of law, are exempt from the operation of the champerty laws. *Frizzle et al. vs. Veach*, 216.
2. Certain provisions of the act of 1824, to revive and amend the champerty and maintenance law &c. declared unconstitutional. See *Forfeiture*, 1. *Gaines et al. vs. Buford*, 494.
3. Contracts for carrying on land suits for part of the land are void; the title made the subject of such contract is forfeited—and neither party can have any action upon it,—by act of 1924, Section 2. *Wash vs. McBrayer*, 565.
4. A party in possession of land, at the time of any contract in relation thereto, in violation of the champerty act of 1824, (*supra*) may plead such contract in bar of any suit *founded thereon*;—and may, by bill of discovery, compel a disclosure of the true date and other circumstances of the contract. *Wash vs. McBrayer*, 565.

See *Land Titles*, 11. *Conveyances*, 1.

**CHILDREN.**

See *Covenant*, 6.—*Devises and Descents*.—*Widow*, 1, 4.—*Parent and Child*.

**CHOSSES IN ACTION, AND EQUITABLE INTERESTS.**

1. Before a debtor's *choses in action* can be reached by bill in chancery, there must be an execution returned "no property," by the proper officer; such return on a *fi. fa.* sent to a county in which the defendant does not reside, is insufficient. *Moore &c. vs. Young*, 516.
2. Chancery has jurisdiction of the demand that accrues to a surety upon his paying the principal's debt; but cannot subject his *choses in action*, without the *fi. fa.* and return required by the statute.—Whether a return of no property on a *fi. fa.* for one debt, will authorize a decree subjecting the defendant's *choses in action* to the payment of another debt of the same creditor—not determined. *Moore &c. vs. Young*, 516.
3. The *choses in action* of a debtor cannot, but by force of the statute, be made liable to his debts by bill in chancery; nor can such things as are not bound by the judgment or execution, be pursued into the hands of those to whom the debtor may have transferred them—Money is not a *chose in action*, nor within the lien of an execution; yet it may be levied on while in the possession of the debtor. *Doyle &c. vs. Sleeper &c.* 534.
4. If a debtor gets his debtor to give a bond to a third party, in lieu of one payable to him, or otherwise transfers his claims, to defraud his creditors, they may nevertheless be reached by an attachment bill. *Bibb vs. Smith &c.* 581.

**CLERKS OF COURTS.**

1. Clerk failing to insert in a complete transcript of a record, any thing properly belonging to it, commits a breach of his bond. *Commonwealth vs. Chambers*, 12.

## CLERKS OF COURTS.

2. Clerk's duty to prepare an appeal bond—party should not be prejudiced by his error. *Bates vs. Courtney's Administrator*, 145.
  3. Clerks are not required by statute, to attest injunction bonds—hence such attestation is not strictly official: though very proper. *Robards vs. Wolfe*, 156.
  4. Case of a new execution issued without a credit which was endorsed on a former execution by mistake—See *Execution*, 6.
  5. Preliminary proceedings, upon an information to remove a clerk from office—See *Practice in the Court of Appeals*, 26 to 29 inclusive, or *Commonwealth vs. Rodes*, 595.
  6. A clerk prosecuted for breach of good behavior, will be required to produce any papers or books belonging to his office, that may be wanted as evidence. *Commonwealth vs. Rodes*, 595.
  7. Buying his office—coming in by hiring his predecessor to resign and procure his appointment, is not an act in a clerk, upon which a prosecution for breach of good behavior *in office*, can be founded. *Commonwealth vs. Rodes*, 596.
  8. Collecting taxes *in specie*, and paying over in *Commonwealth's bank notes*, not ground for removal. *Commonwealth vs. Rodes*, 596.
  9. Recital of the evidence as to the marriage license, in *Rodes' cases*, and conclusion, that, for a clerk to *antedate* an official paper, under any circumstances, is improper, and wholly unjustifiable—but the charge *may be* attended by such palliating circumstances as will relieve this court from the necessity of removing him from office. *Commonwealth vs. Rodes*, 598.
  10. Occasional erroneous charges in fee bills, such as other clerks are in the habit of making—do not prove corruption or incapacity in the clerk who issues them. But extortion or incapacity may be inferred where the charges are very exorbitant or habitual. *Commonwealth vs. Rodes*, 601.
  11. Though fee bills may appear, upon inspection, to contain illegal charges—as for services unnecessary, and probably never performed, in a case where the penalty, upon conviction, is removal from office, (the records of the court not being used, to show what orders were made,) this court will rather presume, that unnecessary orders, which justify the charges of the clerk, were directed by his court, than that he made the charges without performing the services. *Commonwealth vs. Rodes*, 601.
  12. Upon the trial of a clerk, unless a majority of the judges *concur*, as well as to the cause for which he should be removed, as in the propriety of such a sentence upon the whole case, he must be acquitted. *Commonwealth vs. Rodes*, 604.
- Clerk's Fee bills—See *Fee bills*, 1, 2.  
See *Jurisdiction*, 16.

## COLOURED PERSONS.

See *Negroes*.

## COMMISSIONER.

See *Sales 3*.—*Executors and Administrators*, 5, 6. *Practice in Chancery*, 27.

## COMPROMISE.

1. If the vendor of land covenant with his vendee, that if any of the land is lost, he will convey, of another tract, *two acres for one*, and a paramount title appears, of which the vendor has notice, and afterwards sells the land out of which the indemnity was to be made, for a price per acre equal to that he received for the tract first sold—he *may be*

**COMPROMISE.**

held accountable to the *first vendee*, for the proceeds of twice as many acres as he lost, although the amount be double the consideration that he paid for it.—The vendor *cannot* be relieved against his bond given for a compromise on that principle. *Butler vs. Triplett*, 154.

**CONDITION PRECEDENT.**

See *Covenant*, 1, 2, 5.

**CONSAQUINITY.**

See *Covenant*, 6.

**CONSEQUENTIAL DAMAGES.**

1. A party of negroes having gathered at an out-house on a plantation, to dance and frolic, and one of them—a slave being shot dead by one of the patrol who came to disperse them, does not render the owner of the farm, by whose unlawful permission they assembled, liable to the owner of the slave for his value. *Bosworth vs. Brand*, 377.
2. Whenever an injury results to a party, from the unlawful act or omission of another, the injured party is, in general, entitled to reparation, and may maintain his action against the wrong-doer; but the injury must be the direct and immediate, or at least, the proximate and natural, consequence of the act or omission complained of.—And though an injury may be traced up to the unlawful act of one man, if it would not have happened but for the subsequent, unlawful act of another, the latter alone is liable. *Bosworth vs. Brand*, 378.

**CONSIDERATION.**

1. If vendee of land discover a paramount title, and, *without eviction or suit*, obtain the bond of his vendor for an agreed sum as an indemnity for the anticipated loss, the consideration is sufficient to uphold the bond. *Butler vs. Triplett*, 154.
2. If there was no fraud, or concealment, the sale and delivery of a commodity (however worthless) is sufficient to uphold an obligation for the price. *Lighthurn vs. Cooper*, 273.
3. A plea of a *failure* of consideration would not be good when the consideration (such as it was,) was executed. *Marshall vs. Peck & Gilman*, 611.
4. An *invention* is a fair subject of sale. And if what has been sold, in good faith, as such, is in fact an invention, its utility being matter of opinion—contingent, speculative, the transfer of the right to it, is a sufficient consideration to uphold the contract for the price, however useless and worthless the invention may prove to be. *Marshall vs. Peck &c.* 615.

See *Compromise*, 1. *Warranty of chattels or commodities*, 4.

**CONSIGNEE.**

See *Shipping*, 1.

**CONSTABLE.**

1. One justice of the peace has no authority to issue an execution upon the judgment of another, who remains in office and retains his records.—Nor is a constable bound to execute or return such a process. *Clifford et al. vs. Cabiness*, 384.
2. A constable failing to return an execution for twenty days after the return day, is liable for the amount then due, and ten *per cent.* damages; not for interest. *Clifford et al. vs. Cabiness*, 384.

See *Bank-note Contracts and Liabilities*, 2.

**CONSTITUTION.**

1. The provisions of the act incorporating the Lexington and Ohio Rail Road Company, which authorize the company to appropriate the land

## CONSTITUTION.

- of individuals to the use of the road—the damages being first paid, are not unconstitutional. *O'Hara vs. Lexington and Ohio Rail Road Company*, 232.
2. The property of an individual cannot be taken for public use (as for a ferry,) without his consent, or an equivalent first paid. *Henry vs. Underwood*, 247.
  3. The act (of 1808,) under which persons of color emigrating to this State, may be compelled to depart, is a penal law: it dispenses with the trial by jury, and is so far unconstitutional. *Doran & Ryan vs. Commonwealth*, 331.
  4. The provisions of "an act to revive and amend the champerty and maintenance law" &c. of January 7, 1824, which declare that the lands of proprietors and claimants shall be forfeited to the Commonwealth, unless certain improvements are made thereon, as required by the act, are unconstitutional and void. *Gaines et al. vs. Buford*, 484.

## CONTRACTS.

1. A contract in writing for the sale of land, which contains no description or reference identifying the land, could not be enforced consistently with the statute against Frauds and Perjuries. *Hanly &c. vs. Blackford*, 2.
2. Ten acres "adjoining him (the vendee) on the north,"—was rightly laid off, extending (not the whole length of his northern boundary,) but as far upon it as the *vendor's* land reached. *Hanly &c. vs. Blackford*, 3.
3. Such description ("adjoining him on the north") in a bond for a title, to land of the *vendor* adjoining land of the vendee, is sufficiently definite to take the case out of the statute of Frauds and Perjuries. *Hanly &c. vs. Blackford*, 4.
4. If two persons make a joint obligation, *payable to one of themselves*, it is void as to the latter, and is, in effect, the sole obligation of the *other*—against whom the obligee (though his own name is to the bond as a co-obligor) may maintain his action at law, for the whole sum. *Allin, Executor &c. vs. Shadburne's Representatives*, 69, 80—82. Different Opinion of Judge Nicholas, 74—80.
5. Every person capable, in law, of contracting, is presumed to understand the legal effect of his contract. *Allin, Executor &c. vs. Shadburne's Representatives*, 72.
6. A man cannot contract with himself—hence the same person cannot be both obligor and obligee, nor plaintiff and defendant. *Allin, Executor &c. vs. Shadburne's Representatives*, 72, 80.
7. Mistake in writing a contract, is ground for a rescission. *Burchet &c. vs. Faulkner &c.* 100.
8. The phrase "personal estate," in wills and contracts, includes slaves.—*Beaty vs. Judy &c.* 102.
9. A writing which recites that B D is unable to manage his affairs, and has deeded his farm to G B, in consideration of future maintenance, and proceeds—"and if said G B shall provide for me and my beloved wife during our lives, as aforesaid, (I do agree in addition to the land) I have delivered and give up to the said G B, all my personal property of all and every kind whatever, and authorize him to do what he please with the same," is an executory contract, that vests no present title in the grantee. *Beaty vs. Judy &c.* 102.
10. That the master of a steam boat is authorized to make contracts to carry freight, is a presumption arising from the nature of his employment. *Bell et al. vs. Wood*, 147.
11. *Queries*—as to his liability on the bill of lading. *Ibid*, 147.
12. The contracts of the master of a vessel, (within the scope of his authority,) bind the owners. *Bell vs. Wood*, 147.

## CONTRACTS.

13. *Assumpsit* lies against the owners of a steam boat, in favor of the injured party, for a breach of such contract.—Trespass on the case, for damages resulting from a breach of duty. *Ibid*, 147.
14. A distributee agreeing to take a specific sum, (horse and saddle,) and waive his right to distribution, he and his creditor attaching the fund, by bill filed after the agreement, are bound by it. *Stones' Representatives vs. Halley*, 200.
15. The land which a defendant in an execution was bound to convey, is not exempt from the lien of the execution; nor will his conveyance, made in fulfilment of such a contract, while the execution is in the hands of the officer, be effectual, if the land is afterwards levied on and sold. *Millson vs. Riley et al.* 360.
16. A guardian and his wards, with others, are joint owners of a tract of land; he is authorized by an act of assembly to sell their real estate; he (with others) signs a bond, the tenor of which binds those who sign it to convey "our [their] interest" in the land, give possession and a general warranty deed: held, that this bond (signed by the guardian without referring to his fiduciary character) imposed no obligation on him, or his wards, to convey *their* title. *Johnson &c. vs. Johnson's heirs &c.* 367.
17. Contracts between Attorneys and their Clients. See Attorneys at Law, 4, or *Bibb vs. Smith &c.* 482.

See Corporations, 3. Surveying, 2. Conveyances, 13.

## CONVEYANCES.

1. A deed made to carry into effect a contract, for the sale of land, of which there was no adversary possession at the time the contract was entered into, is not tainted with champerty, although the land be held adversely at the time the deed is made. *Norton et al. vs. Sanders &c.* 17.
2. Mortgagor having agreed that the premises should be sold under execution, the purchaser acquired his equitable right. *Cooper &c. vs. Martin &c.* 24.
3. An estate conveyed to husband and wife, is *not* a joint tenancy. Each takes the entirety, not a share which can be severed (*per tout*, and not *per my*.) The husband cannot alienate, or forfeit, the estate; and, on his death, the whole becomes hers. The Kentucky statute, abolishing the *jus accrescendi*, does not apply to the estate of husband and wife. *Ross vs. Garrison &c.* 37. *Rogers vs. Grider*, 243.
4. Covenant of warranty, in a deed made by a commissioner, in pursuance of a decree, binds (the constituent) grantor, and his heirs, as effectually as his own proper deed. *Logan vs. Moore*, 60.
5. A deed of land, in the possession of an adversary claimant, made since the first of July, 1824, is void. *Ball vs. Lively*, 67.
6. A deed not recorded within the time limited by the statute, is void as to creditors without notice of the conveyance at the time their debts were contracted:—such unrecorded conveyance will not operate as a mortgage, nor create any lien whatever, in favor of the grantee, against such creditors. *Graham vs. Samuel*, 167.
7. Query—as to the effect of notice when the debt was contracted. *Ibid*, 167, &c.
8. A deed transmitted from abroad to an agent in the county where the land lies, to be there recorded, takes effect, by delivery, as soon as it is lodged in the clerk's office—the assent of the agent to its being recorded, not being essential. *Daniel vs. Bratton et al.* 210.
9. Query—upon the acts of '76 and '97, relating to privy examinations of non-resident *femes covert*. *Daniel vs. Bratton et al.* 210.
10. One to whom land is stricken off, at a sheriff's sale, may have the deed made to whomsoever he will. *Frizzle et al. vs. Veach*, 211, 212.



CONVEYANCES.

11. Of the remedy, upon the loss of land conveyed with warranty—See *Warranty of Title to Land*, 5, or *Simpson &c. vs. Hawkins &c.* 303—330.
  12. An administration, with the will annexed, granted in another State, does not authorize such administrator to convey land in this State, unless he is also, appointed by the proper court here: his deed would pass no title. *Simpson &c. vs. Hawkins &c.* 306, 316, 327.
  13. Where a party covenanted to convey a tract of land, described as containing a certain quantity, and by boundaries, he shall convey according to the boundaries; and cannot withhold the surplus. *Eubank vs. Hampton*, 343.
  14. As soon as an execution comes to the hands of the sheriff, the defendant's estate is in lien for the amount; and if he convey land which is afterwards levied on and sold under the execution, the sale by the sheriff, has relation back to the time when the execution came to his hands, overreaches that made by the defendant, and passes the better title.—*Million vs. Riley et al.* 360.
  15. The land which a defendant in an execution was bound to convey, is not exempt from the lien of an execution, nor will his conveyance made in fulfilment of such contract, while the execution was in the hands of the officer, be effectual, if the land is afterwards levied on and sold. *Million vs. Riley et al.* 360.
  16. Where there is a decree against divers defendants, for a conveyance, valid as to some, inoperative as to others—the commissioner's deed for the whole land, passes the title of those, and those only, who are bound by the decree. *Wickliffe vs. Dorsey*, 463.
  17. A writing beginning, "this indenture," reciting a sale of a lot, and stipulating to make title—held to be *executory* merely, not a conveyance.—*McDonald vs. Ford*, 464.
  18. After twenty years possession, an executory contract appearing, a conveyance may be presumed; and after a much longer time (thirty seven years) the presumption may be acted upon with confidence, and will not be rebutted by the continued nonresidence of the vendor. *Woodson's administrators and heirs vs. Scott*, 472.
  19. If a vendor makes a deed, and tenders it, and it is refused, and he dies; and afterwards, in a suit with his heirs, the vendee is compelled to accept the title, the same deed will do—but he may have the deed of a commissioner if he prefers it. *Woodson's administrators and heirs vs. Scott*, 473.
  20. The deed of a nonresident acknowledged before the mayor of a city in which he *resides*, (though his residence be but temporary, and he a citizen of another place,) may be admitted to record in the county in this state where the land lies. *McCullock vs. Myers*, 522.
  21. Prior to the act of 1810, a deed could not be admitted to record in the county where the land lay, upon a certificate of acknowledgment before the clerk of another county, or the clerk of the court of appeals.—*McCullock vs. Myers*, 522.
  22. Conveyances in fraud of prior creditors are void at common law. But the common law does not apply this rule to subsequent creditors.—*Doyle vs. Sleeper &c.* 533.
- See *Mortgage*, 1. *Presumptions*, 10. *Vendor and Vendee*, 3. *Covenant*, 15. *Fraud*, 12. *Land Titles*, 8, 11.

CORPORATIONS.

1. An action may be maintained against a corporation, upon a liability imposed by the statute by which it is established; or which results, by implication of law, from its acts, or upon a judgment. *Blanchard vs. Maysville and Lexington Turnpike Company*, 87.

## CORPORATIONS.

2. The act incorporating the Maysville, Washington, Paris and Lexington Turnpike Company, provides a mode of indemnity for the owner through whose land the road may pass. And he may prevent the construction of the road on his land, until the damages are assessed, and paid.—*Blanchard vs. Maysville and Lexington Turnpike Company*, 87.
3. If the company and the owner of the land agree that the work may go on, and the damages be assessed afterwards, the law implies a liability on the part of the corporation, to pay the damages when assessed.—*Blanchard vs. Maysville and Lexington Turnpike Company*, 88.
4. Where an act establishing a road company provides for indemnities to the owners of the land through which the road may pass, and the amount of damage to an owner has been ascertained, in the mode prescribed by the act, the corporation is liable for the payment, and to the action of the owner, without a stipulation under the seal of the corporation, or any express contract. *Blanchard vs. Maysville and Lexington Turnpike Company*, 90.
5. Debt is the appropriate action to recover of a corporation, the damages, allowed by a jury, according to law, to the owner whose land has been taken for the road of a corporation. *Blanchard vs. Maysville and Lexington Turnpike Company*, 91.
6. Lexington and Ohio Rail Road Company—their authority to appropriate land to the use of the road not unconstitutional. *O'Hara vs. Lexington and Ohio Rail Road Company*, 232.

## COSTS.

1. If a complainant is entitled to any relief (though partial) he recovers costs. *Butler vs. Triplett*, 155.
2. That complainant is a non-resident, and has not given security for costs, being pleaded, *in chancery*, he may give the security *nunc pro tunc*, and save the dismissal. *Haskins vs. Spiller*, 176.
3. Parties, failing upon their original bill, but succeeding upon an amendment (in which new complainants joined,) have a decree for so much of the costs in the court of appeals, as the amendment gave rise to.—*Buck &c. vs. Sanders &c.* 190.
4. Bill, by a creditor, against administrators, heirs, &c. to subject the interest of one of them to the payment of a debt: costs to be given against the debtor only. *Stones' Representatives vs. Halley*, 260.
5. Where the appellee brought up the record, before the expiration of the time allowed the appellant for that purpose, and procured an affirmance in the court of appeals, as a delay case, no costs were allowed. *O'Hara vs. Lexington and Ohio Rail Road Company*, 232.
6. If a complainant sustains his claim for any thing that was unjustly withheld from him, costs should be decreed in his favor,—not against him. *Shackleford vs. Helm &c.* 338.
7. If a case be affirmed as to every thing, but the cost, still, if reversed as to that, the plaintiff in this court recovers costs. *Shackleford vs. Helm &c.* 339.
8. A former suit *pending* in chancery, but being *defective*, complainant is permitted to proceed with his new suit, and dismiss the former: he must pay the costs of the former. *Curd &c. vs. Lewis*, 353.
9. Costs in a writ of error where there is a severance. See *Writ of Error*, 1.
10. Whenever a defendant resists the rightful claim of the complainant, he must pay costs. *Stansberry vs. Simmons*, 414.
11. Affirmance as to one defendant; reversal as to another: plaintiffs pay costs to the former, and recover costs of the latter. *Price &c. vs. Boyd &c.* 436.
12. Parceners procuring partition of their land by order of a county court, pay their respective proportions of the fees—and no judgment for costs

## COSTS.

can be given for, or against, any of them, if there is no contest. *Newby and ux. vs. Perkins et al.* 441.

13. No judgment for costs can be given upon the quashal of a writ of error for want of jurisdiction in the inferior court. *Haney vs. Sharp*, 442.
14. The act declaring, that, if an injunction is dissolved, in whole or in part, the complainant shall pay damages, *besides costs*, refers to the costs (of the motion &c.) for which complainant is liable at the time of the dissolution. If he obtains even a partial relief on the final hearing, he recovers his costs, and is liable for costs upon a total failure, as in other cases. *Combs vs. Boswell &c.* 476.
15. No cause should be instantly dismissed, on motion, for want of security for costs. A rule is to be made for the plaintiff to give security within a reasonable time, according to the circumstances of the case, and if he fails to comply, the cause is then to be dismissed absolutely. *Breeding &c. vs. Finley &c.* 477.

## COUNTY COURTS.

See *Executors and Administrators*, 10.

## COUNTY CREDITORS AND COLLECTORS.

See *Limitations*, 19.

## COURTS OF THE UNITED STATES.

See *Imprisonment*, 1, 2.

## COVENANT.

1. An obligation for the payment of money, with a condition endorsed, that obligee shall remove all incumbrances from certain property, before the obligor shall be forced to pay—is a dependent covenant, on which no action can be supported, without a performance of the condition. *Hodges vs. Holeman*, 54.
2. Where there was an agreement, endorsed on a covenant, for the payment of money, that obligee should remove all liens, &c. from certain property, before the obligor should be forced to pay—an existing state of facts, from which a lien *might* thereafter arise, (or might not) was held insufficient, to bar the action on the covenant. *Hodges vs. Holeman*, 50.
3. The pendency of a suit, by which a balance, and lien to secure it, is claimed, does not constitute an incumbrance, within the meaning of such endorsement. *Ibid.* 53.
4. Where the obligation is for payment *on a day certain*, and an endorsement stipulates that all incumbrances, liens, &c. shall be removed before the obligor shall be forced to pay—the right to demand payment, is postponed, not wholly lost, by a failure to remove the liens *by the day*. *Hodges vs. Holeman*, 52.
5. A stipulation to remove all liens, includes the lien of a partner, for his balance on the partnership accounts; and the failure to remove such lien—the removal being a condition precedent,—may be pleaded and relied on at law. *Hodges vs. Holeman*, 54.
6. Covenant, made voluntarily—not based upon any consideration, either valuable or meritorious, cannot be specifically enforced in equity.—The moral obligation to provide for a wife or children has been held sufficient to uphold such a covenant; but the same principle does not extend to collateral relations. *Buford's heirs vs. McKee &c.* 107.
7. Executors, conveying land of their testator, covenanted to warrant, "*to the extent of their assets*"—"and if the land should be lost by any prior claim, the purchase money to be refunded, with interest from this date:" this covenant imposed no liability upon them individually, nor beyond

## COVENANT.

- the assets remaining in their hands, at the time of the eviction. *Mani-fee vs. Morrison's Executor*, 208.
8. Where several breaches are assigned, if erroneous instructions as to either, are given, it is ground for reversal. *Thome vs. Haley*, 268.
  9. Of setting-off damages for breaches of covenant of warranty &c. against unpaid purchase money—See *Set-off*, 3.
  10. A covenant of warranty is not broken until an *eviction* has taken place. *Simpson &c. vs. Hawkins &c.* 306.
  11. A covenant, "to give said S 184 acres of land where he now lives with the improvements as it now is,"—interpreted to entitle the covenantee to the specified quantity, without the surplus (ninety acres) afterwards ascertained to be in the tract. *Stansberry vs. Simmons*, 413.
  12. A defendant resisting the suit of the heir, for the surplus of a tract of land, that the defendant held under the ancestor's agreement for the conveyance of a specific quantity, "*with his father's security in a good warranty deed*,"—makes his answer a cross bill for a specific execution, or for a rescission. The decree should require the heir to make a deed, with approved security, for the title, or, on his failure to do so, rescind the contract. *Stansberry vs. Simmons*, 414.
  13. A vendor who sells, and covenants to convey, without warranty, *all his right, title and interest* in land, is bound to exhibit his title, and show that he has some *title* (though not the best) or *some right*, which he can convey; else the contract may be rescinded. *Johnson vs. Tool*, 479.
  14. A covenantor, stipulating to convey so many acres of land, out of a large tract, provided there is so much unsold and free of such and such claims, may select it where he will in the tract—but must lay it off, and show that it is unsold, and free of the specified interference. *Johnson vs. Tool*, 480.

## CROSS BILL.

See *Jurisdiction*, 23.

## DAMAGES.

See *Error coram vobis*.

## DEBT, on simple contract, and plea of payment.

See *Payment*, 5.

## DECLARATION.

See *Pleas and Pleading*, 7, 8, 15, 18, 21, 24, 26, 27, 32, 35.

## DEED.

See *Conveyances*.

## DEFAULT.

See *Practice in Suits at Law*, 6.

## DELIVERY. of Deeds &amp;c.

See *Release*, 3.

## DEMAND.

See *Bailment*, 1.

## DEPOSITIONS.

1. Depositions taken upon notice to some, not all, of the adverse party, may be used against those who had notice. *Hanly &c. vs. Blackford*, 4.
2. A decree should not be reversed for the improper admission of a deposition, if there was sufficient proof without it. *Hanly &c. vs. Blackford*, 4.

## DEPOSITIONS.

3. Tenants in possession, and *their warrantor*, being admitted defendants in ejectment, depositions should not be read against *them*, which would not be admissible *against him* also. *Woodward &c. vs. Spiller*, 180.
4. A deposition being admitted, when objected to, no notice or cross examination appearing in the record, is error. *Thome vs. Haley*, 269.

## DESCENTS.

See *Devises and Descents*.

## DETINUE.

1. Detinue may be maintained against a defendant who has had possession of the chattel sued for, but *has parted with it* (without being divested by authority of law,) *before* the date of the writ. *Pool vs. Adkisson et al.* 118.
2. The plaintiff in a judgment in detinue may have an execution issued for the specific slave or thing recovered: and a tender of the alternate value will not discharge the judgment, unless the plaintiff elects to take it, or the court is satisfied, that, without the defendant's fault, it is beyond his power;—the officer must take the *posse comitatus*, if necessary, and seize the slave or thing recovered; and for that purpose, may make a forcible entry into the defendant's *dwelling house*, if he finds it closed, and has good reason to believe the slave or thing is there.—*Keith vs. Johnson et al.* 604.

See *Action*, 5. *Pleas and Pleading*, 38.

## DEVASTAVIT.

1. A declaration in debt, for a *devastavit*, averring that *estate* of intestate came to the hands, possession, "*or knowledge*" of the administrator, sufficient &c. (not, that *goods and chattels*, sufficient &c. came to his hands to be administered &c.) is bad on demurrer. *Griffith et al. vs. Commonwealth*, 271.
2. *Plene administravit* is a good plea (by statute,) to an action of debt for a *devastavit*. *Griffith et al. vs. Commonwealth*, 271.
3. Plea of *nil debet*, or of covenants performed, to a declaration in debt, for a *devastavit*, is bad, on demurrer. *Griffith et al. vs. Commonwealth*, 271.
4. If an administrator makes distribution, and debts appear, he is liable for a *devastavit*: he must look to the distributees for indemnity, and if he took no bond of them, must abide the consequences. *Johnson &c. vs. Fuquay &c.* 514.

## DEVICES AND DECENTS.

1. A devise to J, the son, and if he "die before he arrives at the age of twenty one, or *without issue*," then to C, &c. construed to mean a failure of issue at the time of the son's death, and held to be a good limitation. *Brown's heirs vs. Brown's devisees*, 41.
2. Questions upon the descents, devises and limitations over *of slaves*, under the statutes of Kentucky, suggested, and waived. *Brown's heirs vs. Brown's devisees*, 41.
3. If an estate is devised to one, and in case he dies without issue, then to another, and the first devisee dies in the life time of the testator, the devise does not lapse, but passes to the second devisee—otherwise, if the first devisee survives the testator. *Brown's heirs vs. Brown's devisees*, 45.
4. The testator, in the *first devise*—to his son, declares that, if the son die without issue, "all that is *hereby* given to my son, shall be the inheritance of my daughter;" and by the last clause, devises the residue of his estate to the son, without any mention of the daughter. The son

## DEVICES AND DESCENTS.

- having died without issue, in the life time of the testator—held, upon the presumed intention, as indicated by the entire will, that the daughter was entitled to the “residue,” by virtue of the limitation in the first devise. *Brown's heirs vs. Brown's devisees*, 43.
5. A devise, or bequest, to a testator's children, is not confined to those born at the date of the will. Those born after the date of the will, and pretermitted, and not provided for by settlement,—even those born after the death of the testator, are entitled to shares equal to those born before the date of the will—by the common law rule of construction in England; in Kentucky, by force of the statute, such children are entitled to such shares as they would have taken if no will had been made. *Haskins &c. vs. Spiller*, 171. *Woodward &c. vs. Spiller*, 181.
  6. A residuary devise to the testator's children, in general terms, (intended merely to dispose of such estate as may have been accidentally omitted in the more specific devises, will not prevent an after-born, or posthumous, child, from taking (under the statute of Kentucky,) shares equal with those born before the date of the will. *Haskins vs. Spiller*, 174.
  7. A devisee cannot claim and hold, under a title adverse to that of the testator, any thing devised to him, and at the same time, take a devise or legacy under the will. He must acquiesce in the testator's right to the disputed property, and surrender it to the devisee to whom it is given, or forego the benefit of any devise or legacy to himself. *Gore vs. Stevens &c.* 203.
  8. Where a devisee, who claims some of the property devised, by a title adverse to that of the testator, accepts and receives other property bequeathed to himself, in the same will,—it is tantamount to an election; and he will be compelled to surrender his adversary claim to the other devises. *Gore vs. Stevens &c.* 204.
  9. The heir of a devisee, or legatee, who was dead when the will was made, or died before the testator, does not take the property so given—it is a lapsed legacy, or devise. *Gore vs. Stevens &c.* 205.
  10. Personal property of a testator, which being lapsed legacies, or from any other cause, passes not by the will, goes to the general residuary legatee, if any. Otherwise as to real estate, which, being a lapsed devise, or which, from any other cause, passes not by the will, descends to the heirs. *Gore vs. Stevens &c.* 206.
  11. Feme covert, tenant in common, dying, leaving children by the husband who survives her, he takes the estate for life—the children can make no valid lease of it. *Daniel vs. Bratton et als.* 209.
  12. Land patented to the ‘heirs’ of one in whose name it was entered and surveyed, they take by descent, and it is subject to sale under execution against the estate of the decedent to his heirs descended. *Frizzle et al. vs. Veach*, 211–12.
  13. A testator devised all his estate to his wife during widowhood, with power, as long as she remained a widow, to sell the real estate, and retain one third of the proceeds, with one third of the personalty, for life: the whole to go to the children upon the termination of her estate. She made no renunciation of the provision made for her by the will, within the time allowed by law, and married without having sold the estate: held that she was not entitled to dower, and that all her rights under the will were terminated by the marriage. *Vance and Wife vs. Campbell's heirs*, 229.
  14. Chattels which a decedent had only a life estate in, do not go to the administrator. *Simrall's Administrator vs. Graham*, 574.
- See *Executor and Administrator*, 2. *Possession*, 21.

## DISTRIBUTION.

1. A distributee agreeing to take a specific sum, (horse and saddle,) and waive his right to distribution, he and his creditor attaching the fund, by bill filed after the agreement, are bound by it. *Stone's representatives vs. Halley*, 200.  
See *Advancement*.

## DIVISION OF LAND.

1. A tract of land having been devised by a testator, sold out by the devisee, and divided among several purchasers—another claimant obtaining a decree for a share of the devise, his portion may be laid off in one body, from any part of the original tract, in the most convenient mode, with respect to the improvements, &c. and need not be taken in parcels from each purchaser. Those from whom it is taken, will be entitled to indemnity, *pro rata*, from the others. *Haskins &c. vs. Spiller*, 176.
2. Where a claimant, under a will, in which he was pretermitted, obtains a decree against a devisee, or his vendees, for a share of the land, to be allotted to him, it should be so laid off as to leave to the defendants their improvements, as far as a convenient form of division will allow. Improvements included in the claimant's share, so far as they constitute additions to its value, at the time of the allotment; also, the waste, deteriorations of soil, rents and profits, from the use of the land, are to be valued, the accounts adjusted, and balance decreed. *Haskins &c. vs. Spiller*, 176-7.
3. The vendees of one who, upon taking under a will, was compelled to relinquish the land which he had sold as his own, but which the testator had devised to others, will be in no wise affected by any partition among the devisees, to which they (the vendees) were no parties.—*Gore vs. Stevens &c.* 207.
4. A partition among parceners made under an order of a county court, without legal notice to all interested, is unauthorized. *Newby et ux. vs. Perkins et al.* 441.

## DIVISION OF OPINION AMONG JUDGES.

See *Practice in the Court of Appeals*, 7.

## DOWER.

1. Widow is not entitled to dower in the slaves of the husband emancipated by his last will and testament. *Lee vs. Lee's Executors &c.* 48.
2. By the act of 1798, slaves descend and pass as real estate—the act of 1797, for the distribution of intestates' goods and chattels, therefore does not apply to them, and the right of the widow to dower in the husband's slaves, depends on the common law, (restricted by statute,) and she takes, for life, a third part of the slaves of which he died possessed—not of those which he had held, but had parted with. *Smiley vs. Smiley Administrator &c.* 94.
3. The heirs, administrator and widow having agreed, that the slaves of the intestate should be sold, and the proceeds divided according to their respective rights: held, that the widow is entitled—not merely to the use of her proportion of the money for life, upon giving security for its payment to the heirs upon her death—but to so much, absolutely, as her life estate in one third of the slaves, may be worth, reference being had to their productiveness, by hire, &c. *Smiley vs. Smiley's Administrator &c.* 96.
4. A testator devised all his estate to his wife during widowhood, with power, as long as she remained a widow, to sell the real estate, and retain one third of the proceeds, with one third of the personalty, for

## DOWER.

- life: the whole to go to the children upon the termination of her estate. She made no renunciation of the provision made for her by the will, within the time allowed by law, and married without having sold the estate: held that she was not entitled to dower, and that all her rights under the will were terminated by the marriage. *Vance and Wife vs. Campbell's Heirs*, 229.
- 5. Form of a declaration in dower and for mesne profits—good for the former object, not for the latter. *Taylor vs. Brodrick*, 345, 347.
- 6. Several parcels of land in possession of the same tenant, and in the same town, may be included in one suit at law for dower, *Taylor vs. Brodrick*, 347.
- 7. A plea, in a suit for dower, that the husband did not die seized of the land, is immaterial, and no bar to the action. *Taylor vs. Brodrick*, 347.
- 8. If the defendant in an action of dower, was a purchaser from the husband, and has added to the value of the land by improvements, those facts may be pleaded, and will be available to curtail the allotment of dower. *Taylor vs. Brodrick*, 347.
- 9. If the value of land is enhanced by improvements made by the tenant, under a *bona fide* purchase from the husband, the widow will be endowed of so much only as will be equal in value to one third of the land independent of those improvements. If there is no such increase of value, the judgment will be for one third of each parcel. If the tenant relies on his improvement of the property, he must plead it; and the facts must be tried by a jury, who will determine what portion of the property in its improved state, will be equivalent to one third without the improvement: for which, to be allotted by metes and bounds by the sheriff, the widow will have judgment. *Taylor vs. Brodrick*, 348.
- 10. The right of dower is not embraced by the statutes of limitations. But, in chancery, *this*, like 'every new right of action in equity,' 'must be acted on, at the utmost, within twenty years.' Circumstances—such as would bring the case within the exceptions of the statute,—may constitute exceptions to this rule; as where the demandant was absent from the state when the right accrued, she may assert it at any time within ten years after her return. *Ralls vs. Hughes and Hedges*, 407.

## DUELLING.

- 1. A challenge, within the meaning of the statute against duelling, is a *requisition*, *demand*, or *request*, to fight with deadly weapons: an expression of readiness or willingness to accede to such a requisition, if it should be made, does not amount to a challenge. *Commonwealth vs. Tibbs*, 524.
- 2. Words insinuating a desire to fight with deadly weapons—as they tend to provoke such combat, may amount to a misdemeanor at common law. *Commonwealth vs. Tibbs*, 524.

## EJECTMENT.

- 1. Defendant in ejectment, without any title, or twenty years possession, is not protected by lapse of time. *Norton et al. vs. Sanders &c.* 14.
- 2. Warranty of the grantor of a plaintiff in ejectment, does not authorize him to insert a count upon the demise of his grantor.—The latter may have such a count stricken out, upon motion. *Ross vs. Garrison and wife*, 35.
- 3. If the tenants in possession, together with their warrantor, be admitted defendants in ejectment, there can be no recovery against them, upon



**EJECTMENT.**

evidence which would not authorize a recovery against *him also*.—*Woodard &c. vs. Spiller*, 180.

4. Lessee of tenants in common, suing for the whole tract, may recover for as much as he shows title in, and demises by, any of the co-tenants.—But a judgment for more—for the whole, when there are co-tenants on whose title there is no demise, is erroneous. *Daniel vs. Bratton et als.* 210.
5. The purchaser of land, sold and conveyed by a sheriff, under execution against the estate of a decedent to his heirs descended, has no right to use their names, without their consent, in an ejectment, to recover the land. *Frizzle et al. vs. Veach*, 211–12.
6. A tenant in common cannot recover upon a joint demise. *Gaines et al. vs. Buford*, 483 and 501.

**ELECTION.**

Election to take under a will, or hold adversely. See *Devises and Descents*, 8.

Election, to proceed with one, or another, suit pending for the same cause. See *Practice in Suits at Law*, 9.—*Practice in Chancery*, 22.

**ENDORSEMENT.**

See *Assignment*. *Bills of Exchange*, 3.

**ENTRY.**

1. C, claiming, under an elder grant, adversely to M, acquired the possession by buying the interest of persons holding parts of the tract, under executory contracts for purchase, from M; such entry held to have been made, by C, *under M's title*; which neither C, nor those claiming under him, can dispute, without restoring the possession. *Carrico et al. vs. McGee*, 5.
2. The entry held to be *adverse* as to a part of the tract, not embraced by the proof that the claimant had acquired the possession by contract with his adversary's tenants. *Carrico et al. vs. McGee*, 6.
3. When the *entry* of the tenant was in right of his wife, who was in possession of the premises, (and so not a forcible entry,) he is not liable to eviction by a warrant, although he may have taken a lease from the plaintiff after the entry. *Morris vs. Bowles*, 97.
4. Fishback and Morgan's Entry of 40,000 acres, on Big Bone. *Morgan's heirs vs. Parker*, 444.

See *Possession*, 16, 25.—*Practice in the Court of Appeals*, 19.

**EQUITABLE INTERESTS.**

See *Choses in action and Equitable Interests*.

**EQUITY.**

1. If two persons jointly owe a debt, and both sign a bond for it, payable to one of themselves, he who is alone liable at law, upon such bond, to his co-obligor, the obligee, might be relieved, in equity, from the payment of all above his just portion of the debt. *Allen, Executor &c. vs. Shadburne's Representatives*, 71.
2. A decree settling conflicting claims to land, should not be founded on the mere legal title: the equitable title, entry, &c. should be investigated. *Walker's Executors vs. Ogden*, 250.
3. If a party has a good defence at law, (to the whole or part of the demand) and fails to present it in due form, or it is disallowed by the verdict, chancery cannot relieve him. *Walker's Executors vs. Ogden*, 253.
4. Extraordinary, inexcusable delay in preparing a cause, and consequent discharge of the injunction, are not, in general, sufficient grounds for

## EQUITY.

- denying to the complainant the relief to which he shows himself entitled, in a new suit upon the same equity. Should an assignor become insolvent in the mean time, and the assignee thus lose by the delay, the circumstance would be entitled to consideration. *Curd &c. vs. Lewis*, 353.
5. Notice of an equity does not affect the rights of a party in a trial at law. *Million vs. Riley et al.* 361.
  6. Where property is taken and sold under execution, and a stranger claims and recovers it, or its value, the party who loses it, has a remedy in chancery against the defendant in the execution, whose debt was satisfied by the sale. *Price &c. vs. Boyd &c.* 436.
  7. The recovery of damages for the breach of a covenant to convey, extinguishes the obligation, and, in effect, rescinds the contract: the mere pendency of the suit has not that effect—hence, the attitude of the parties when one seeks a specific execution in chancery, is essentially different before, and after, a judgment at law. *Woodson's Administrators and heirs vs. Scott*, 470.
  8. When a vendor comes into chancery to compel his vendee to take the title, the cause of the breach and delay will be looked into: if it has been designed, with a view to profit by the noncompliance, especially if the vendee has sustained an injury by it, the vendor will not be assisted; but, if it has been fortuitous, or from mere neglect, and the vendee not injured, the delay will not of itself preclude the relief sought. *Woodson's Administrators and heirs vs. Scott*, 470.
  9. A mere gift or gratuity cannot be enforced in equity. But against a judgment on a bond, (which imports a sufficient consideration,) unless the want, or failure, of consideration, total or partial, is *clearly shown*, the chancellor will not relieve on that ground; that it was a gift, cannot be inferred from the fact, that the payee "induced" the promisor to give his note, as a compensation above what had been agreed upon, for services rendered. *Bibb vs. Smith &c.* 582.
  10. Obligation given, upon a compromise, by the vendor of land, for double the amount of the purchase money, on the appearance of a paramount claim.—See *Compromise*, 1, or *Butler vs. Triplett*, 152.  
See *Rescission of Contract*, 6, 7, 17.—*Agent*, 11.

## ERROR CORAM VOBIS.

1. A writ of error *coram vobis* is a matter of right: but if made a *supersedeas*, it should not be awarded, without notice to the defendant;—and *want of notice* may be ground for discharging the supersedeas: but it is not good cause for quashing the writ, or for awarding damages upon its dismissal. *Combs et al. vs. Carter*, 178.

## ESTOPPEL.

1. Subsequent purchaser, whose deed recites, that the land was sold as the property of the *obligee* in a written contract for a title, cannot deny the title of such obligee—he is estopped by the recital. *Hanly &c. vs. Blackford*, 3.
2. The tenant is estopped to deny the title of him under whom the tenant entered. *Carrico et al. vs. McGee*, 5. *Norton et al. vs. Sanders*, 15–16.
3. A party in possession of land is estopped to deny the title of him under whom he entered. But where the land is claimed under a sheriff's deed, the tenant is not estopped from shewing, that the title of the defendant in the execution, was only equitable, and was not subject to sale under execution. *Million vs. Riley et al.* 362.
4. A defendant in ejectment, whose title, or whose vendor's title, was sold under execution, will not be permitted to show that there was an outstanding title paramount to that of the defendant in the execution, in

## ESTOPPEL.

order to defeat the action of the plaintiff claiming under the sheriff's conveyance. *Million vs. Riley et al.* 363.

5. A recital in a traverse bond, that an obligor had traversed the inquisition, estops him from denying that fact. *Wayman vs. Taylor*, 527.
6. Estoppel of the heir by the warranty of the ancestor. See *Warranty of Title to Land*, 1, 2, 3.

## EVIDENCE.

1. No proof is necessary against those who admit the allegations of a bill, by failing to answer. *Hanly &c. vs. Blackford*, 4.
2. The court must decide upon the competency of title papers, and the right to use them, and, incidentally, under what title the party entered. *Carri-co et al. vs. McGee*, 6.
3. In trespass *quare clausum fregit*, plea of *liberum tenementum*, and issue thereon, evidence of paramount title in either party, is admissible.—*Wilsons vs. Bibb*, 8.
4. No reversal for the admission of relevant testimony at an inappropriate time. *Wilsons vs. Bibb*, 9.
5. Records, plats and papers bearing upon the question of possession, are admissible, under an issue on a plea of *liberum tenementum*. *Wilsons vs. Bibb*, 9.
6. Admissions of items of account, before a commissioner, should appear in proof. *Commonwealth vs. Chambers*, 12.
7. Copies of patents not duly authenticated—not shewn to include the land, were properly rejected. *Norton et al. vs. Sanders &c.* 19.
8. Testimony that can have no legal effect, should not be admitted, nor used to counteract the effect of other illegal evidence. *Norton et al. vs. Sanders &c.* 19.
9. Remark of a mother, that land (to which she had the better title) was the place of her daughter, may imply an intention to give it to the daughter, a parol gift, or the like; but should not be construed into an admission of an adversary title in the daughter. *Ross vs. Garrison and wife*, 38.
10. An authority to sign the name of a party to a covenant for a title, may be presumed (in equity) from his knowledge of, and acquiescence in, the sale—when the denial of the answer is not wholly unequivocal. *Talbot &c. vs. Sebree's heirs &c.* 56.
11. Record of a *scire facias*, admitted, without objection, in the court below, as proof of the original judgment, will be allowed the like effect here. *Ball vs. Lively*, 67.
12. A writing which recites that D B is unable to manage his affairs, and has deeded his farm to G B, in consideration of future maintenance, and proceeds—"and if said G B shall provide for me and my beloved wife during our lives, as aforesaid, (I do agree in addition to the land) I have delivered and give up to the said G B all my personal property of all and every kind whatever, and authorize him to do what he please with the same," is an executory contract, that vests no present title in the grantee: there was no error in rejecting it, when offered as evidence of title in the grantee, to slaves which the grantor afterwards emancipated. *Beatty vs. Judy &c.* 102.
13. In an action to recover slaves conveyed (by a third person) to the plaintiff, in trust, to secure certain debts, evidence that the debts had been "paid or nearly so," was properly rejected—it would bear only upon a question proper for chancery. *Pool vs. Adkisson et al.* 110.
14. Evidence, that the defendant—in detinue for slaves, which he had sold, as the agent of another, had some knowledge of, and co-operated to defeat, the title of the lawful owner, was proper for the jury, and sufficient to preclude a nonsuit. *Pool vs. Adkisson et al.* 111.

## EVIDENCE.

15. Two defendants were found guilty of forcible entry and detainer, and traversed the inquisition: the declaration, on the traverse bond, avers (for breach) that the traverse was not prosecuted with effect: the record, produced in evidence, shews the inquisition found true *as to one*, untrue *as to the other*—it does not support the declaration, and the variance is fatal. *Cain et al. vs. Flynn*, 144.
16. Plea of *non est factum*, to an action on an *injunction bond*, attested by the clerk, casts the *onus probandi* on the plaintiff—as in other cases;—for if the attestation were an official act, and evidence of *the signing*, it would not identify the individual sued, as the one who signed. *Robards vs. Wolfe*, 155.
17. One only, of the three subscribing witnesses, being produced, to prove the execution of a will, he should be credible, and his testimony direct and positive: his “impressions,” and statements “according to the beat of his recollection,” are not sufficient. *Carrico vs. Neal and others*, 163.
18. Inferences, from circumstances, in favor of, and against the authenticity of a will. See *Wills*, 4, or *Carrico vs. Neal et al.* 164.
19. Acknowledgments of an agent, made subsequent to the transaction in which he acted as agent, (not part of the *res gesta*,) are not evidence against the principal. *Davis vs. Whitesides*, 177.
20. A register of the births of children, in the hand writing of the father, *who is dead*, is admissible to prove the ages of the children. *Woodard et als. vs. Spiller*, 180.
21. Comparison of hand-writing is, in general, not evidence to prove a signature. Where the writing is too old for a living witness to have seen the party write, or in corroboration of other proof, comparison is sometimes admitted. *Woodard et als. vs. Spiller*, 180–1.
22. Whether one man, or another, was in the actual possession of land, at a particular time, is a question of fact, to be decided by a jury—to whom all the facts and circumstances, in proof, should be submitted, without instructions as to the inference they may draw from any particular fact. *Boucher vs. Williamson*, 228.
23. Extraneous evidence is not admissible to show what the parties to an award agreed to refer; it should appear by the record. *Grimes vs. Grimes*, 234.
24. That there was no visible alteration of the actual possession of slaves and personalty, transferred, by deed, from one to another in the same family, is not, *per se*, evidence of fraud: but a fact which may be submitted to the jury, whose province it is to decide the question, upon all the proof. *Wash et al. vs. Medley*, 269.
25. Not error to reject a deed when offered merely to prove the extent of defendant's possession, as it could not show that he was not in possession of the land sued for. *Million vs. Riley et al.* 361.
26. Where the recovery is in specie, for a debt due in paper, there must be evidence of the value of the paper, or the verdict cannot be sustained. *Canterberry vs. Commonwealth*, 419.
27. A hoghead of tobacco was deposited in a warehouse, for the purchaser, who, unable to find it when wanted, took another belonging to the same seller, which proved to be not half as valuable:—the warehouseman being accountable to, and sued by, the seller, for one of the two hogsheds, the jury were at liberty to infer that the property of that not found by the purchaser, reverted, when he took another in lieu of it, in the seller; and their verdict for the value of *that one*, is sustained. *Grady vs. Leavell*, 427.
28. A charge for a commission, or discount, on a bill of exchange received in payment, must be proved—courts will not take notice of a mercantile usage, to allow it. *Ward vs. Everett*, 429.

## EVIDENCE.

29. A son may recover of his father's executors for labor done by himself and his slaves in his minority, upon proof, from which a promise of payment may be inferred, without proving an *express* promise: But the facts, that the son married in his minority, brought his wife and two slaves obtained by her, to his father's, and continued in the management of the farm until he came of age—are not sufficient to justify a verdict for the son. *Engleman's Executors vs. Engleman*, 438.
30. As to a parol reference and award, one arbitrator testified that he believed that *the defence* to a portion of the plaintiff's demand, was sustained; the other testified that it was his impression that no award was made in relation to that portion:—the evidence of the former, being *consistent with the submission*, and more positive, is conclusive; the award is held to be a bar to this, as well as the other portion of the demand, and a verdict therefor, set aside. *Engleman's Executors vs. Engleman*, 438.
31. Allegations of a bill not answered. See *Practice in Chancery*, 10.
32. The testimony of one witness prevails against the denial of an answer, sworn to only by a defendant who has no personal knowledge of the facts. *Combs vs. Boswell &c.* 474.
33. A declaration in slander, charging words as having been spoken in the third person, is sufficiently sustained by proof of words spoken in the second person. *Dailey vs. Gaines* 529.
34. An insolvent father having purchased land, and taken the title to his children—his answer in a suit to subject it to his debt, or his declarations after the conveyance, may not be evidence against them:—his indebtedness at the time, and payment with his money, are evidence against them. That they (infants,) had money to make such purchase, will not be presumed, in the absence of proof. *Doyle &c. vs. Sleeper &c.* 532.
35. An officer, sued, in detinue, for a chattel that he has taken and holds under an order of court, must show, by his plea, how he holds it; evidence of his *right to hold*, is not admissible under a plea of *non detinet*. *Cromwell vs. Clay*, 579.
36. A clerk prosecuted for breach of good behavior, will be required to produce any papers or books belonging to his office, that may be wanted as evidence. *Commonwealth vs. Rodes*, 595.
37. Though fee bills may appear, upon inspection, to contain illegal charges—as for services unnecessary, and probably never performed: in a case where the penalty, upon conviction, is removal from office, the records of the court not being used, to show what orders were made, this court will rather presume, that unnecessary orders, which justify the charges of the clerk, were directed by his court, than that he made the charges without performing the service. *Commonwealth vs. Rodes*, 601.
38. Proof of fraud in the sale of a commodity, is inadmissible, where there is no plea (or *allegata*) charging fraud. *Marshall vs. Peck &c.* 612.  
See *Practice in the Court of Appeals*, 8, 15.—*Estoppel*, 4.—*Presumptions*, 12, 18.—*Writ of Right*, 2, 3.—*Motion*, 4.—*Fraud*, 14.—*Notice*, 10.—*Improvements on Land*, 2.—*Clerks of Courts*, 11.

## EXECUTIONS.

1. Sale by sheriff, of *two lots*—for more than the amount of the execution, is illegal. *Conner &c. vs. Martin &c.* 24.
2. Interest of mortgagee is not vendible under execution. *Cooper &c. vs. Martin &c.* 24. *Buck &c. vs. Sanders &c.* 188.
3. Land patented to the "heirs" of one in whose name it was entered and surveyed, they take *by descent*;—and it is subject to sale under execu-

## EXECUTIONS.

- tion against the estate of the decedent to his heirs descended. *Frizzle et al. vs. Veach*, 211-12.
4. The legal title of a defendant in an execution, to land in the adverse possession of another, is subject to levy, and sale, under execution. *Frizzle et al. vs. Veach*, 211-12.—Judge Nich. has of a different opinion—217.
  5. Where land is levied on as the property of a defendant, against whom the possession is held adversely, the valuation must be of the land, (not merely of the defendant's claim,) without deduction for the adverse possession. *Frizzle et al. vs. Veach*, 216.
  6. As soon as an execution comes to the hands of the sheriff, the defendant's estate is in lien for the amount; and if he convey land which is afterwards levied on and sold under the execution, the sale by the sheriff, has relation back to the time when the execution came to his hands, overreaches that made by the defendant, and passes the better title.—*Million vs. Riley et al.* 360.
  7. An execution was returned to the clerk's office, on which the plaintiff had endorsed a credit for nearly the full amount;—eight years afterwards, he applies for a new execution for the original sum, regardless of the credit, which he alleges was endorsed by mistake, and which is issued accordingly: held that, though it would be prudent for the clerk, in such case, to wait for an order of court to correct the mistake, yet if he issues the new execution disregarding the credit, and upon a motion to quash, it appears, that the mistake had really been made, and the defendant was not entitled to the credit, the proceeding may be sanctioned, and the motion to quash, should be overruled. *Frankfort Bank vs. Markley*, 373.
  8. Duty of sheriffs in relation to paying over the proceeds of executions.—See *Sheriffs*, 3, 4, 5, or *Canterberry vs. Commonwealth &c.* 416.
  9. Quashal of a sale and sale bond. See *Sales*, 12, or *Wilson vs. Percival*, 419.
  10. An execution in the hands of an officer gives a lien upon the chattels of the defendant within the county—which is not lost by their temporary removal.—But those to which, not being in the county, the lien had never attached, until the defendant sold them *bona fide*, do not become liable by being brought into the county by the purchaser. *Clagget vs. Force*, 428.
  11. Remedy, where the property sold to satisfy an execution, is afterwards recovered by a stranger—See *Equity*, 7, or *Price &c. vs. Boyd &c.* 436.
  12. An execution may be levied upon money in possession of the defendant—but there is no lien upon it, and it is not bound by the execution after the debtor parts with it. *Doyle &c. vs. Sleeper &c.* 534.
- See *Service of Process*, 3, 4, 5.

## EXECUTORS AND ADMINISTRATORS.

1. Estate having come to the knowledge of an administrator, (not reduced to possession) does not render him liable. *Griffith et al. vs. Commonwealth*, 271.
2. Property of a decedent which (by act of November, 1821,) is exempt from execution, passes to the widow and heirs, if any; and is not assets to be administered. *Griffith et al. vs. Commonwealth*, 271.
3. An administrator, with the will annexed, may exercise all the powers intended to be conferred on the executor by the will. *Simpson &c. vs. Hawkins &c.* 306.
4. But administration, with the will annexed, granted in another State, does not authorize such administrator to convey land in this State, unless he is also, appointed by the proper court here: his deed would pass no title.—*Ibid.* 306, 316, 327.
5. The confirmation by the county court, of a settlement made by commis-

## EXECUTORS AND ADMINISTRATORS.

- sioners with an executor, may be resisted by any party interested in the estate, with, or without, the concurrence of others; and every facility should be afforded him for that purpose, by the court—whose duty it is, to scrutinize such accounts rigidly, and require of the executor satisfactory proof as to every item objected to, and take care that no unjust or exorbitant charges are admitted. *Cundiff vs. Zachery's Executor*, 371.
6. If any of the parties interested fail to make their objections when the report comes regularly before the court, and until the settlement has been confirmed, they will be precluded. *Ibid*, 371.
  7. No action at law lies against a foreign administrator, who has not qualified in this State. The only remedy, if any, is by bill in chancery, upon appropriate facts. *Curle vs. Moor*, 445.
  8. If an administrator makes distribution, and debts appear, he is liable for a *devastavit*: he must look to the distributees for indemnity, and if he took no bond of them, must abide the consequences. *Johnson &c. vs. Fuquay &c.* 514.
  9. One who is both administrator and guardian, will be deemed to hold the assets in the former capacity, where no change in the manner of holding appears; and his sureties, as *administrator*, will alone be chargeable. *Johnson &c. vs. Fuquay &c.* 514.
  10. The *county court* may, by its order, release the sureties of an administrator or guardian. *Johnson &c. vs. Fuquay &c.* 514.
  11. The bond of an administrator should be payable to the Commonwealth—but is not void if the justices of the county court, by their names, are the obligees. *Johnson &c. vs. Fuquay &c.* 514.
  12. The consent of an executor in Virginia, that a slave should vest in the legatee, may be inferred from his removal, and bringing the slave with him, to this State. *Simrall's Administrator vs. Graham*, 574.
  13. Chattels which a decedent had only a life estate in, do not go to the administrator. *Simrall's Administrator vs. Graham*, 574.
- See *Limitations*, 29.—*Covenant*, 7.

## FACTOR.

See *Agent*.

## FEDERAL COURTS.

See *Imprisonment*, 1, 2.

## FEE BILLS.

1. Clerks are to put their fee bills into the hands of the sheriff, for collection, before the first of April, annually; and then the sheriff is bound to account for them, on or before the first of October following. If the sheriff receives them after the first of April, he may be required to account, in a reasonable time. *Fowler et al. vs. the Commonwealth for Taylor*, 358.
  2. Where a sheriff received fee bills for collection *after the first of April*, and is sued for failing to account, an averment that he did not pay &c. "as directed by law," being merely tantamount to an averment that he did not pay &c. *by the first of October*, is no sufficient breach. *Fowler et al. vs. the Commonwealth for Taylor*, 358.
- See *Clerks of Courts*, 10, 11.

## FERRY.

1. Grant of a ferry, across the Ohio, to Peleg Underwood, under a special act of Assembly—Construction of the act. *Henry vs. Underwood*, 245.
2. By the general law, the owner of a ferry must be the owner of the land where it is established; and no ferry is to be granted on the Ohio river, within half a mile of one previously established.—A special act, author-

**FERRY.**

- izing the county court of Jefferson to establish a ferry across the Ohio, "from a point about half a mile below Shrieve's ferry, on said Underwood's land," allows the new ferry within half a mile of another—not dispensing with the requisition of the general law *as to title*; and Underwood having *failed to show title in himself to the landing*, the order granting the ferry is reversed. *Henry vs. Underwood*, 246.
3. The property of an individual cannot be taken for public use (as for a ferry) without his consent, or an equivalent first paid. *Henry vs. Underwood*, 247.
  4. The act authorizing county courts to discontinue ferries, must be strictly pursued. *Brown vs. Givens*, 260.
  5. The notice, or summons, (or order authorizing it,) to the owner of a ferry, to show cause against its being discontinued, must apprize him of the nature of the complaint. *Brown vs. Givens*, 260.
  6. Two causes only will authorize an order discontinuing a ferry—1, failure, for six months after it is granted, to provide boats and hands; 2, its being disused and unfrequented for two years. *Brown vs. Givens*, 260.
  7. The appearance of the owner of a ferry, summoned to show cause against its discontinuance, does not waive the necessity of due notice to him, of the grounds of the motion. *Brown vs. Givens*, 261.
  8. A court of chancery having ordered a ferry to be leased—the tenant remaining in possession after his lease expired (the order still in force,) is entitled to the tolls. *McCaully vs. Givens*, 262.

**FORCIBLE ENTRY AND DETAINER.**

1. When the *entry* of the tenant was in right of his wife, who was in possession of the premises, (and so not a forcible entry,) he is not liable to eviction by a warrant, although he may have taken a lease from the plaintiff after the entry. *Morris vs. Boules*, 97.
2. The only proper issue upon a traverse, is, whether the inquisition is true, or not. Dilatory pleas are not admissible. Nor can any advantage be taken of irregularities in the proceedings upon the warrant in the country. If two cases are pending for the same forcible entry, an election may be directed. *Boucher vs. Williamson*, 227.
3. A traversor who appeared on the trial in the country, cannot quash the inquisition for, or take any advantage of, the want of proper service of the warrant. *Philips vs. Harmon et al.* 468.
4. The finding on a warrant of forcible entry being traversed, the justice should return the papers to the clerk's office *within ten days*—but his failure to do so, is not cause for a dismissal, nor should it prejudice either party. *Wayman vs. Taylor*, 527.
5. A recital in a traverse bond, that an obligor had traversed the inquisition, estops him from denying the fact—bond having been duly executed and the papers returned to the circuit court, the proceedings may be presumed (nothing appearing to the contrary) to have been regular, and if no traverse is found with the papers, one may be filed *nunc pro tunc*. *Wayman vs. Taylor*, 527.

See *Evidence*, 15.

**FORFEITURE.**

1. The provisions of "an act to revive and amend the champerty and maintenance law" &c. of January 7, 1824, which declare that the lands of proprietors and claimants shall be forfeited to the commonwealth, unless certain improvements are made thereon, as required by the act, are unconstitutional and void. *Guines et al. vs. Buford*, 484.
2. Every conveyance, or contract for the sale of land in the adverse possession of a stranger to the contract, is void, (by the champerty act of '24)



## FORFEITURE.

and no suit can be maintained upon a title acquired under such circumstances. But the title of the vendor is not forfeited by such vain attempt to transfer it; nor is his right of action, upon his preexisting title, thereby destroyed. *Wash vs. McBrayer*, 566. Dissent of Judge Nicholas, upon the latter point, 569.

## FRAUD

1. A release obtained by a fraud, which the injured party is aware of, but submits to from a strong motive of interest, may be set aside by the chancellor. *Davis &c. vs. Morgan*, 20.
2. Vendee of a chattel, discovering a defect which the vendor fraudulently concealed, may return, or tender it back, and rescind the contract—or retain it, and recover damages. *Hoggins vs. Becraft &c.* 30.
3. Circumstances, the result of fraud, should have no effect upon a controversy.—But, the vendee of a party who has obtained a judgment of eviction, may enforce the judgment (by *scire facias* &c.) without fraud. *Ball vs. Lively*, 64.
4. A party who is induced, by fraud or imposition, to enter a credit for a payment—as, for the amount of a note which turns out to be forged, in whole or in part—may disregard the transaction, and cancel the credit. *Letcher vs. Bank of the Commonwealth*, 84.
5. The owner of a land warrant applies to a deputy surveyor, to have it entered and surveyed. The deputy having another warrant in his possession, anticipates the present applicant, enters that other warrant upon the land which he intended to appropriate, procures a transfer of the warrant to himself, and has the land surveyed, accordingly, the same day. The applicant's warrant is also entered immediately after the other, and the survey made the next day, covering most of the land so appropriated by the deputy. The applicant then files his bill in equity, to compel the deputy to relinquish the interference: held that, as the warrant used by the deputy, came first to his hands, as he was not prohibited by law, from appropriating land for himself, and as he might legally use his information, however acquired, as he pleased, chancery could afford the complainant no redress. *Rice vs. Williams*, 192.
6. If there was fraud in the sale of a commodity, tendering it back, in due time, rescinds the contract. *Lightburn vs. Cooper*, 273.
7. False representations by the seller, relative to what the buyer might examine for himself, do not amount to a fraud, nor to a warranty. If the defects are such as could not be discovered, with ordinary care, false representations on those points, are fraudulent, and ground for rescission, by a return, or tender in due time. *Lightburn vs. Cooper*, 273.
8. For an agent who had located, surveyed and sold land for his principal, to conceal that fact, and purchase the warrants of him, would be fraudulent. *Taylor vs. Knox's Executors*, 396.
9. Query, whether a stranger would be bound to impart his knowledge, before making the purchase. *Ibid*, 396.
10. A party buys an estate, pays for it, and has the title made to his children; his creditors file a bill to subject it to the payment of his debt:—the debt having been contracted before the purchase; the answers of father and children denying that it was an advancement to them, and other circumstances indicating an intent to defraud creditors—held that the estate was liable for the debt. *Doyle &c. vs. Sleeper &c.* 531. Dissent of Judge Nicholas in this case, 551.
11. If a father holds the title to real estate, and being much indebted, conveys it to his child, the conveyance will be (by the statute) fraudulent and void as to all his creditors. If he is not indebted at the time of the conveyance, it may be good against subsequent creditors. *Doyle &c. vs. Sleeper &c.* 532.

## FRAUD.

12. Conveyances in fraud of prior creditors are void at common law. But the common law does not apply this rule to subsequent creditors. *Doyle &c. vs. Sleeper &c.* 532.
  13. If a party purchase property, pay for it with his money, and cause the conveyance to be made to a *stranger*, there will be a resulting trust to the payer, and chancery will decree the property subject to his debts. If the conveyance be made to his children as an *advancement*, it will be good, and the property will not be liable to the father's debts. But if it appears that the conveyance was not intended as a *bona fide* advancement, but to defeat creditors, it will be deemed fraudulent, and a sale of the property, to pay the father's debt, may be decreed. *Doyle &c. vs. Sleeper &c.* 536.
  14. That the intention of a father who procures an estate, purchased and paid for by him, to be conveyed to his children, was fraudulent, cannot be inferred from the mere fact of his indebtedness at the time, but slight additional circumstances will justify that inference. *Doyle &c. vs. Sleeper &c.* 540.
  15. Opinion of Judge Underwood: that, if a father, *who is insolvent*, buys an estate, pays for it, and has the title made to his children, it is a fraud upon his creditors—and the estate a trust in the hands of the children, which should be held liable for the father's prior debt. *Doyle &c. vs. Sleeper &c.* 543. Different opinion of Judge Nicholas, 551.
  16. Opinion of Judge Underwood, that, where a debtor has effects subject to execution, and so disposes of them, that they cannot be reached by his creditors, it is fraudulent, not only in him, but in the party who accepts or receives the effects. *Doyle &c. vs. Sleeper &c.* 543.
  17. Opinion of Judge Nicholas (dissenting) in a case where a father having purchased real estate, with his money, and had it conveyed to his children, his creditors attempt to subject it to the payment of his debt.—See *Parent and Child* 5, or *Doyle &c. vs. Sleeper &c.* 551.
  18. If a debtor gets his debtor to give a bond to a third party, in lieu of one payable to him, or otherwise transfers his claims, to defraud his creditors, they may nevertheless be reached by an attachment bill. *Bibb vs. Smith &c.* 581.
  19. False representations by the seller, as to the *value* of a commodity, or as to any matter that the buyer can ascertain by ordinary vigilance or enquiry, do not subject the seller to any legal liability. *Marshall vs. Peck &c.* 611.
  20. Proof of fraud in the sale of a commodity, is inadmissible, where there is no plea (or *allegata*) charging fraud. *Marshall vs. Peck &c.* 612.
- See *Rescission of Contracts*, 2—*Evidence*, 24—*Choses in Action*, 5, and *Equitable Interests*, 3.

## FRAUDS AND PERJURIES.

See *Statute of Frauds &c.*

## GARNISHEE.

See *Interest*, 3.—*Choses in Action and Equitable Interests*, 4.

## GIFT.

1. Gift, with reservation of a reversion upon a contingency. See *Reversion and Remainder*, 1, or *Betty vs. Moore*, 236.
2. Gift of a note, or bond. See *Equity*, 9, or *Bibb vs. Smith &c.* 582.

## GRANTS OF LAND.

See *Land Titles*, 2.

## GUARDIAN AND WARD.

1. A guardian, his wards, and others being tenants in common, a contract signed by the guardian and others, stipulating to convey, by the description "*our interest*" in the land, imposes no obligation on him or his wards, for *their* title. *Johnson &c. vs. Johnson's heirs &c.* 367.
  2. If the tenor of a guardian's bond is such as to hold him accountable for the proceeds of the real estate of his wards, which he was authorized to sell, the manner of the sale is immaterial: if it be even by verbal contract, and he receives the money, and they are willing to confirm the sale, he and his sureties will be answerable on the bond. *Johnson &c. vs. Johnson's heirs &c.* 367.
  3. An ordinary bond of a guardian renders him and his sureties liable to the wards, for every obligation resulting from acts which he was legally authorized to perform; and if, when the bond was executed, he was authorized to sell their land, it secures the proceeds to them. *Johnson &c. vs. Johnson's heirs &c.* 369.
  4. A guardian applying to the circuit court for an order to sell the real estate of infants, is required (by an act of 1813,) to give bond for the faithful performance of the trust, before the decree is rendered, and also, to report his proceedings, under the decree, to the court. *Winlock vs. Winlock*, 382.
  5. The proceeds of the sales, in such cases, are to be disposed of, for the benefit of the infants, according to the order of the court decreeing the sale, and not otherwise. *Ib.* 382.
  6. Application may be made to the court for such order, which it is the duty of the court to make; or, the court, having power over the whole subject, will sustain the bill of the infant for relief, and may make an order upon the guardian, or his representatives, to pay the proceeds and interest, by a given day; and, upon their failure to comply, may render a joint decree against him, or them, and his surety in the bond, for the amount. *Ib.* 382.
  7. One who is both administrator and guardian, will be deemed to hold the assets in the former capacity, where no change in the manner of holding appears; and his sureties, as *administrator*, will alone be chargeable. *Johnson &c. vs. Fuquay &c.* 514.
  8. The county court may, by *its order*, release the sureties of an administrator or guardian. *Johnson &c. vs. Fuquay &c.* 514.
- See *Jurisdiction*, 16.

## HABERE FACIAS.

See *Possession*, 7, 8.

## HEIRS AND DEVISEES.

1. The warranty of the ancestor—lineal, collateral, or commencing by *disseizin*—binds the heir (in Kentucky) to the extent of the value of the lands to him descended; no further. And the action of the heir will be barred for so much of the land held under the warranty of his ancestor, as is equal in value to that which he took by descent—and no further. *Logan vs. Moore*, 58.
2. Man and wife continuing to occupy the estate, which her former husband had devised to her during widowhood, then to his children, must account for the rents &c. from the time of her second marriage; and may charge them for support &c.—not exceeding the income of their estate. *Vance and wife vs. Campbell's heirs*, 231.
3. The whole estate being devised to the wife, during widowhood, she cannot be allowed for the support of the children while she so held the estate. *Vance and wife vs. Campbell's heirs*, 231.
4. A devisee, or any party interested, may contest the settlement with an

**HEIRS AND DEVISEES.**

executor, made by a commissioner and returned to the county court.  
(See *Executor and Administrator*, 5, 6.) *Cundiff vs. Zachery's Ex.* 371.

**HOTCHPOT**

See *Advancements*.

**HUSBAND AND WIFE.**

1. An estate conveyed to husband and wife, is *not a joint tenancy*. Each takes the entirety, not a share which can be severed (*per tout*, and not *per my*.) The husband cannot alienate, or forfeit, the estate: and, on his death, the whole becomes hers. The Kentucky statute, abolishing the *jus accrescendi*, does not apply to the estate of husband and wife. *Ross vs. Garrison and wife*, 37. *Rogers vs. Grider*, 243.
2. *Feme covert*, tenant in common, dying, leaving children by the husband who survives her, *he* takes the estate for life—the children can make no valid lease of it. *Daniel vs. Bratton et als.* 209.
3. The remedy for the survivor of husband and wife, to recover an estate conveyed to them during the coverture, is complete at law—chancery has no jurisdiction. *Rogers vs. Grider*, 244.

**IDENTITY OF NAMES.**

See *Presumptions*, 2.

**IMPRISONMENT.**

1. The Kentucky statute, abolishing imprisonment for debt, is not the law of the federal courts. *Johnson vs. Lewis*, 183.
2. Jailor is bound to receive persons committed by authority of the United States, and keep them until discharged by due course of the laws of the United States. *Johnson vs. Lewis*, 183.

**IMPROVEMENTS ON LAND.**

1. Where one in possession of land, held, *bona fide*, as his own, has erected buildings thereon, he (or those claiming under him) may remove them, without incurring any responsibility to the owner of the paramount title. *Wickliffe vs. Clay*, 591.
2. If one buy land, with buildings upon it, *which he moves off*, and then loses the land, by a better title appearing, his vendor, upon a rescission of their contract, will be entitled to retain, out of the consideration to be restored, *the value of the buildings so removed*: not their estimated value at the time of the sale, but so much as they would have been worth (preserved with common care) as additions to the land at the time of the eviction—equivalent to what the occupant could have recovered for them of the successful claimant.—And where the removal was without the consent or privity of the party against whom the decree for a restoration of the purchase money, is obtained—he may (because of the difficulty of the proof) *elect* to retain the value of the buildings according to the above rule, or as moveable structures. *Wickliffe vs. Clay*, 591.

See *Division of Land*, 1, 2. *Dower*, 8, 9. *Rescission of Contract*, 19. *Forfeiture*, 1.

**INDORSEMENTS.**

See *Assignment*. *Bills of Exchange*, 3.

**INFANCY**

Infants' Lands. See *Guardian and Ward*, 1 to 6 inclusive.

1. The avoidable acts of an infant will be confirmed by slight acts and circumstances, after he is of age. *Deason &c. vs. Boyd and O'Hara*. 45.
2. If one makes a contract during infancy, and after he comes of age, sells the property acquired under it, and fails, for a long time, to give no-

## INFANCY.

- vice of a disaffirmance, he is bound by the contract. *Deason &c. vs. Boyd and O'Hara*, 45.
3. A party cannot disaffirm an agreement, made while he was an infant, that a judgment, with a condition, should be rendered in his favor, and have the benefit of the judgment, without the condition. *Lowry vs. Drake's heirs*, 47.
  4. There should be no decree against infants without answers by guardian *ad litem*. *Johnson &c. vs. Johnson's heirs &c.* 369.
  5. Opinion of Judge Nicholas (dissenting,) that infants should not be prejudiced by any allegations contained in their answers, put in by guardian *ad litem*; and that no effect should be given to such allegations by their agreement to have a decision on the merits here. *Doyle &c. vs. Sleeper &c.* 563.
  6. It is the duty of a circuit court to see that the rights of infants are protected, and every fair defence made in their behalf. In this court, the rules applicable to other cases must be applied to theirs. *Galloway vs. Hamilton's heirs &c.* 576.

See *Practice in the Court of Appeals*, 20, 21.

## INFERENCES.

See *Presumptions*.

## INJUNCTION.

1. Where a judgment is enjoined as to a part of the debt, the interest and sheriff's commission on that part, should be included. *Greathouse vs. Hord*, 105.
2. Security in an injunction bond (the injunction granted out of court) is to be approved by the clerk—and so much of the order granting an injunction, as designates the security to be taken, is a nullity—the injunction is valid, although the clerk take a different security from that designated in such order. *Greathouse vs. Hord*, 106.
3. The circuit court of one county has no jurisdiction to enjoin a judgment rendered (by a justice of the peace, or circuit court,) in *another* county. *Lamaster vs. Lair*, 109.
4. Clerks are not required, by statute, to attest injunction bonds—hence, such attestation is not strictly official: though very proper. *Robards vs. Wolfe*, 156.
5. Sureties indemnified by mortgage cannot have an injunction to stay the creditor from proceeding to collect his debt until they subject the mortgaged property. *Buck &c. vs. Sanders &c.* 189.
6. The act declaring, that, if an injunction is dissolved, in whole or in part, the complainant shall pay damages, *besides costs*, refers to the costs (of the motion &c.) for which complainant is liable at the time of the dissolution. If he obtains even a partial relief on the final hearing, he recovers costs, and is liable for costs upon a total failure, as in other cases. *Combs vs. Boswell &c.* 476.

## INNKEEPER.

1. An innkeeper, who receives the horse of a guest (as he is bound to do,) merely to shelter and feed him, is *not* answerable to the true owner of the horse. But by the sale, exercise of control over, or detention of, the horse, without the sanction of the owner, the innkeeper would be rendered liable. *Pool vs. Adkisson et al.* 120.

## INSOLVENT DEBTORS.

See *Choses in Action and Equitable Interests*.

## INSTRUCTIONS.

1. Instructions of the circuit court deemed erroneous, but abstract and

## INSTRUCTIONS.

- harmless; therefore not sufficient cause for a reversal. *Norton et al. vs. Sanders et als.* 15.
2. Instructions entirely abstract, are erroneous. *Ross vs. Garrison &c.* 38.
  3. Instruction that no state of proof could warrant, is ground for reversal, though it does not appear what the evidence was, to which it was intended to apply. *Robards vs. Wolfe*, 156.
  4. Whether one man, or another, was in the actual possession of land, at a particular time, is a question of fact, to be decided by a jury—to whom all the facts and circumstances, in proof, should be submitted, without instructions as to the inference they may draw from any particular fact. *Boucher vs. Williamson*, 228.
  5. Where several breaches are assigned, if erroneous instructions applicable to either, are given, it is ground for reversal. *Thome vs. Haley*, 268.
  6. Whether property alleged to belong to a defendant in an execution, was liable to a levy or not, is a question for the jury, and an instruction that assumes the liability, is erroneous. *Thome vs. Haley*, 268.
  7. Instructions of the court which assume, or presuppose, a fact proper for the decision of the jury, should not be given. *Lightburn vs. Cooper*, 273.
  8. This court will consider the instructions of the inferior court, with reference to the evidence before that court when they were given, and if the instructions can be sustained so far as there was evidence to which they were applicable, will not reverse, though they might be erroneous if taken literally. *Million vs. Riley et al.* 363.
  9. A cause may be reversed for erroneous instructions, notwithstanding the verdict may appear to be right upon the proof—*per Judge Underwood. Gaines et al. vs. Buford*, 502.
  10. On the trial of an issue upon a plea of want of consideration, the question must be submitted to the jury for their decision upon the facts, and their inferences from the facts; and instructions which assume that the covenant sued on was founded on a supposed liability, in the absence of proof that such was the sole consideration, are erroneous. *Fry vs. Rees*, 519.

## INTEREST.

1. Interest accruing after the decree, should not be allowed. *Williams vs. Wilson*, 159.
2. A creditor having agreed to take Commonwealth's paper for his specie debt, and the debtor having failed to pay (or prove a tender,) until the paper had risen in value, the debtor is not entitled, in equity, to any allowance for the advance in the price of the paper; nor to be exempt from the accruing interest on the debt. *Shackleford vs. Helm &c.* 338.
3. A debtor is not excused from the payment of interest, because the fund is attached in his hands, by bill in chancery, unless he brings the money into court, or is restrained from using it. *Shackleford vs. Helm &c.* 338.
4. A constable failing to return an execution in due time, and incurring a liability for the amount, and damages, is not liable for interest also.—*Clifford et al. vs. Cabiness*, 384.
5. A mere depository, or one who receives the money of another, but does not use it, is not to pay interest. Whoever uses the money received for another, is liable for interest. *Taylor vs. Knox's Executors*, 398.
6. In trover, the jury may give damages equal to the value of the thing converted and the interest on it. Upon the same principle, the chancellor, in decreeing against an agent who had received "trade" on his own account, for the land of his principal, may include interest in the decree, in addition to the cash value of the land at the time of the sale. *Taylor vs. Knox's Executors*, 400.
7. The chancellor cannot allow interest on a judgment which does not bear

**INTEREST.**

interest at law—and must enjoin it when the payments are equal to the damages and costs. *Ward vs. Everett*, 429.

See *Use and Occupation*, 1, 2.

**INVENTIONS.**

See *Sales*, 23.

**JAILER.**

1. If the jailer, without legal authority, discharge a debtor committed under execution, he becomes liable for the whole debt. *Johnson vs. Lewis*, 183.
2. Jailer is bound to receive persons committed by authority of the United States, and keep them until discharged by due course of the laws of the United States. *Johnson vs. Lewis*, 183.

**JOINDER.**

1. Joinder of different plaintiffs. See *Pleas and Pleading*, 35.
2. Of several defendants in one penal prosecution. See *Joint and Several Undertakings and Liabilities*, 5.
3. Of different causes of action. *Ibid*, 6.

**JOINT AND SEVERAL UNDERTAKINGS AND LIABILITIES.**

1. A suit may be maintained, against a single obligor, upon a writing purporting to be the joint bond of the defendant and another. *Allin's Executors vs. Shadburne's Representatives*, 68.
2. If two persons make a joint obligation, payable to one of themselves, it is void as to the latter, and is, in effect, the sole obligation of the other—against whom the obligee (though his own name is to the bond as a co-obligor) may maintain his action at law, for the whole sum. *Allin, Executor &c. vs. Shadburne's Representatives*, 69, 80. Different Opinion of Judge Nicholas, 74-80.
3. In joint (as in joint and several) obligations, each obligor is responsible for the whole undertaking. *Allin, Executor &c. vs. Shadburne's Representatives*, 71.
4. If two persons jointly owe a debt, and both sign a bond for it, payable to one of themselves, he who is alone liable at law, upon such bond, to his co-obligor, the obligee, might be relieved, in equity, from the payment of all above his just portion of the debt. *Allin, Executor &c. vs. Shadburne's Representatives*, 71.
5. A joint proceeding against several persons charged with emigrating to the State, contrary to law, is irregular. *Doram &c. vs. Commonwealth*, 331.
6. A note, or other contract, signed by one person, and a guarantee of the payment, or performance, annexed thereto, and signed by another person, are separate contracts—upon which no joint action can be maintained. *Marshall vs. Peck & Gilman*, 610.

See *Release*, 1.—*Practice in the Court of Appeals*, 31.

**JUDGMENT.**

1. A judgment is not void, (though it may be reversible,) for a defect in the mode of entering it. *Graham vs. Samuel*, 170.
2. A judgment on a note, with credits endorsed, which are not allowed in the verdict, is erroneous.—But a bill in chancery will not lie for restitution, after the judgment has been paid. The remedy, if any, is by assumpsit. *Adams vs. Dunlap*, 584.

**JURISDICTION.**

1. Chancery has no jurisdiction of the suit of the heirs, to recover the real estate devised to others; the remedy is at law. *Brown's heirs vs. Brown's devisees*, 40.

## JURISDICTION.

2. The fact that the complainant was lulled by delusive hopes of compromise, until the statute had barred his claim at law, does not give the chancellor jurisdiction. *Waller vs. Demint*, 92.
3. The circuit court of one county has no jurisdiction to enjoin a judgment rendered in another county. *Lamaster vs. Lair*, 109.
4. The dismissal of a bill *absolutely*, by a court which had no jurisdiction of the case, is no bar to another suit. *Lamaster vs. Lair*, 109.
5. The remedy for the survivor of husband and wife, to recover an estate conveyed to them during the coverture, is complete at law—chancery has no jurisdiction. *Rogers vs. Grider*, 244.
6. Restitution (of land) is a matter of local jurisdiction. Though where other circumstances give jurisdiction over the parties and their contract, and the restitution is a mere incident, it may be decreed in another county.—(See *Rescission of Contract*.) *Walker's Executors vs. Ogden*, 252.
7. If a party has a good defence at law, (to the whole or part of the demand) and fails to present it in due form, or it is disallowed by the verdict, chancery cannot relieve him. *Walker's Executors vs. Ogden*, 253.
8. Chancery has jurisdiction to restrain a multiplicity of warrants, for the tolls received by the tenant of a ferry,—the subject of a suit in chancery, and leased under an order of court. *McCaully vs. Givens*, 261, 263.
9. The Court of Appeals has jurisdiction to revise the proceedings of county courts, in cases of persons of color charged with migrating to this State. *Doram et al. vs. Commonwealth*, 331.
10. Chancery has no jurisdiction to relieve against a judgment, upon the ground of payment, where the defence was available at common law. *Craig vs. Whips*, 375.
11. The State tribunals have no jurisdiction of an action for a penalty, under the act of Congress relating to the census—that act does not attempt to confer such jurisdiction. *Haney vs. Sharp*, 442.
12. The courts of the State cannot take cognizance of a penal case arising under an act of Congress—Query, whether the legislation of both governments could give such jurisdiction—that of either one cannot. *Haney vs. Sharp*, 442.
13. The appellate jurisdiction of the Court of Appeals is restricted to cases in which the inferior courts have cognizance. A writ of error on a case of which no inferior court of the state had jurisdiction, must be quashed—and no judgment for costs can be given. *Haney vs. Sharp*, 442.
14. The Court of Appeals has jurisdiction to revise the judgment of the circuit court, upon the motion of a party, asserting his appointment to the office of attorney for the Commonwealth, and moving for leave to take the oaths of office, and enter upon the duties. *Bruce vs. Fox*, 448.—Dissentient Opinion of Judge Nicholas—*Ibid*, 457.
15. The clause of the act giving the Court of Appeals jurisdiction “in cases in which the inferior courts have cognizance” applies only to *judicial* proceedings, not to discretionary or executive acts. *Bruce vs. Fox*, 448.
16. The executive or discretionary acts of inferior courts—such as the appointment of a clerk, or the removal of a guardian—are not subject to revision by the appellate court. *Bruce vs. Fox*, 449.
17. The court having no jurisdiction over the subject matter, its decree is a nullity—consent could not give the jurisdiction. *Wickliffe vs. Dorsey*, 462.
18. Where the court has jurisdiction of the subject matter, but not of the person—as where no defendant is found in the county, but the process is served elsewhere—the decree is not void; for the party might appear and submit to the jurisdiction.—If he fails to do so, the decree is mere-



## JURISDICTION.

ly, erroneous, and binding until regularly reversed. *Wickliffe vs. Dorsey*, 462.

19. Chancery has jurisdiction of the demand that accrues to a surety upon his paying the principal's debt. *Moore &c. vs. Young*, 516.
20. A judgment on a note, with credits endorsed, which are not allowed in the verdict, is erroneous.—But a bill in chancery will not lie for restitution after the judgment has been paid. The remedy, if any, is by assumpsit. *Adams vs. Dunlap*, 584.
21. If one pays a debt against which he has a set-off, chancery has no jurisdiction of the case.—Nor has it jurisdiction of so small a sum as \$12 50. *Adams vs. Dunlap*, 584.
22. The connection of the matter of a cross bill—be it, *per se* legal or equitable—with the subject matter of the original bill, gives the chancellor jurisdiction of the cross bill—of which he cannot be ousted by a dismissal of the original bill.—If the sole object of a bill were to enforce a contract, a cross bill to rescind a different contract, and with other parties (about the same property) would not lie.—But where the vendor of land, among other things in his bill, asserts a lien for the purchase money, against an assignee of his covenant for a title, the latter may maintain a cross bill for a rescission of the contract. *Wickliffe vs. Clay*, 589.

See *Justice of the Peace*, 1.

## JUROR AND JURY.

1. Affinity is cause of principal challenge to a juror—the uncle, by marriage, of a party is not competent. *Dailey vs. Gaines*, 529.
2. Questions to be decided by a Jury. See *Practice in suits at Law*, 5, 27. —*Practice in Chancery*, 9. *Negroes*, 1.
3. Jury sworn to *try the issue* when there is no plea. See *Practice in Suits at Law*, 20.

## JUSTICE OF THE PEACE.

1. One justice of the peace has no authority to issue an execution upon the judgment of another, who remains in office and retains his records. Nor is a constable bound to execute or return such a process. *Clifford et al. vs. Cabiness*, 384.
2. The records of magistrates are to be construed with much liberality, and understood according to the apparent intention, however inaccurately expressed. *Long vs. Ray*, 430.

## LANDLORD AND TENANT.

1. The acquisition of the title of a stranger, *by a tenant*, will not destroy the relation between him and his landlord, whose title he cannot question without restoring the possession. *Norton et al. vs. Sanders et al.* 15.
2. Notice to quit is unnecessary, if the tenant disclaims holding under the landlord. *Ross vs. Garrison and wife*, 36.
3. A demand of possession terminates a tenancy at will, and, if made six months before the expiration of the year, is a sufficient notice to quit. *Ross vs. Garrison and wife*, 36.
4. After a judgment of eviction, the plaintiff, or his vendee, before or after the delivery of possession—may make a lease of the premises, which the tenant may accept, and thus change his tenure from adverse to amicable, and be precluded from disputing the title of his lessor. *Ball vs. Lively*, 65.
5. A judgment of eviction against a tenant, destroys the relation between him and his landlord; and the tenant may then, without waiting for the *habere facias* to be executed, purchase any other title for his own benefit. *Gore vs. Stevens &c.* 203.

## LANDLORD AND TENANT.

6. There may be cases, where the vendee of land (though a *quasi tenant*,) may protect himself, in chancery, under a superior title acquired from a stranger, against the claims of the vendor under whom he entered.—*Walker's Executors vs. Ogden*, 250.
7. The settlement and possession of a tenant is available to his landlord, for protection by the seven years limitation law. *Gaines et al. vs. Buford*, 481.

See *Forcible Entry and Detainer*, 1.

## LAND TITLES.

1. A decree settling conflicting claims to land, should not be founded on the mere legal title: the equitable title, entry, &c. should be investigated. *Walker's Executors vs. Ogden*, 250.
  2. Where a patent purports a grant of land to a man who was dead at its date, the title vests in his heirs, *by force of the statute*: and, where the patent issued before the date of the act, (1792,) their title did not commence till then. *Moss et al. vs. Currie et al.* 266.
  3. Twenty years adverse possession may be relied on, without a grant or conveyance. *Simpson &c. vs. Hawkins &c.* 306.
  4. The chancellor will not compel a purchaser to take a title based on mere possession—*per Judge Nicholas in a Dissent.* *Simpson &c. vs. Hawkins &c.* 316.
  5. A conveyance of land in this state, by a foreign executor, passes no title. *Simpson &c. vs. Hawkins &c.* 306, 316, 327.
  6. The sale of an estate under a decree in chancery does not effect the right of one (not party to the suit,) who holds a title paramount to that of him whose title was sold under the decree. *Simpson &c. vs. Hawkins &c.* 313, 330. Judge Nicholas' suggestions on this point, 323.
  7. A vendor who sells, and covenants to convey, without warranty, *all his right, title and interest* in land, is bound to exhibit his title, and show that he has some *title* (though not the best,) or *some right*, which he can convey—else the contract may be rescinded. *Johnson vs. Tool*, 479.
  8. Sales of land in the adverse possession of a stranger to the contract, are *void*, and no right of action arises to either party, from such a contract, by *Act of 1824, section 24.* *Wash vs. McBrayer*, 565.
  9. Contracts for carrying on land suits for part of the land are void; the title made the subject of such contract is forfeited—and neither party can have any action upon it: by act of 1824, section 2. *Wash vs. McBrayer*, 565.
  10. A party in possession of land, at the time of any contract in relation thereto, in violation of the first or second section, (*supra*, 9, 9,) may plead such contract in bar of any suit *founded thereon*;—and may, by bill of discovery, compel a disclosure of the true date and other circumstances of the contract. Act of 1824, section 3. *Wash vs. McBrayer*, 565.
  11. Every conveyance, or contract for the sale of land in the adverse possession of a stranger to the contract, is void, (by the champerty act of 1824) and no suit can be maintained upon a *title acquired* under such circumstances. But the title of the *vendor* is not forfeited by such vain attempt to transfer it; nor is *his* right of action, upon *his pre-existing title*, thereby destroyed. *Wash vs. McBrayer*, 566. Dissent of Judge Nicholas on the last point, 569.
- Land Titles subject to Execution. See *Execution*, 3, 4.

## LAWYERS.

See *Attorney at Law*.—*Attorney for the Commonwealth*.

## LEGACY.

See *Devises and Descents*.

LIEN.

1. An agreement was endorsed on a covenant for the payment of money, that the obligee should remove all liens &c. from certain property, before the obligor should be forced to pay—an existing state of facts from which a lien might thereafter arise (or might not) held not to constitute a defence to the action. *Hodges vs. Holeman*, 50.
2. Partners have each a lien, by operation of law, upon the partnership effects for any balance in his favor, upon the partnership accounts. *Hodges vs. Holeman*, 53.
3. The lien of a partner, for a balance (on the partnership accounts,) is not an incident of the legal title to the effects; but results from the partnership, and is not affected by the mortgages of either partner on his own share. *Hodges vs. Holeman*, 51.
4. Where the obligation is for payment on a day certain, and the endorsement stipulates that all incumbrances, liens, &c. should be removed before the obligor shall be forced to pay—the right to demand payment, is postponed, not wholly lost, by a failure to remove the liens by the day. *Hodges vs. Holeman*, 52.
5. The pendency of a suit, by which a balance, and lien to secure it, is claimed, does not constitute an incumbrance, within the meaning of such endorsement. *Ibid*, 53.
6. The lien of a partner on the partnership effects, for a balance due him on the partnership accounts, is not limited to the balance accrued at the time of the dissolution, but is co-extensive with the transactions on the joint account. *Hodges vs. Holeman*, 55.
7. A party holding a title bond for land, which he sells, assigning over the bond to his vendee, retains a lien on the land for the consideration—which, as against any subsequent assignee with notice, he may enforce, in chancery—without first obtaining a judgment at law for the debt. *Galloway vs. Hamilton's heirs &c.* 576.
8. Unrecorded deed no lien. See *Conveyances*, 6.
9. Lien by execution, upon the land of the defendant. See *Executions*, 6.
10. Lien by execution, upon chattels. See *Executions*, 10.

LIMITATIONS.

Limitation of Estates. See *Devises and Descents*.

1. Defendant in ejectment, without either title, or twenty years possession, is not protected by lapse of time. *Norton et al. vs. Sanders et als.* 14.
2. The possession delivered under a *habere facias*, has relation back to the commencement of the suit, and although the holding of the tenant during the time between service of the declaration and notice, and execution of the *habere facias*, was adverse to the plaintiff, that period cannot be included in the time relied on to bar the plaintiff (or those claiming under him) in any subsequent contest for the land. *Ball vs. Lively*, 66.
3. If a party in possession of slaves claimed by another, acknowledges the title of, and holds under, the latter, such holding is not adverse, and the statute of limitations does not run against the claim—if acknowledged within five years. *Waller vs. Demint*, 92.
4. If property be given or sold, with a condition, that it shall revert upon a contingency, and if the reservation be valid, the statute of limitations does not commence running, in bar of the right of the reversioner, until the contingency happens. *Betty vs. Moore*, 236.
5. A second donee of a slave (or one claiming under him,) relying upon the possession of the donor for five years after the first gift, in bar of the right of the first donee, must show that the latter had not the possession at any time within the five years; or that the donor continued, for five years, in the uninterrupted, adverse possession. *Daniel vs. Daniel*, 238.

## LIMITATIONS.

6. Statutes of limitation are rules of decision in chancery. *Fenwick vs. Macey's Executors*, 278.
7. A bill to assert a right of more than twenty years standing, in favor of one laboring under no disability, will not in general, be sustained.—But there are exceptions : instance,—in behalf of an occupant defending his freehold. *Fenwick vs. Macey's Executors*, 278, 297.
8. The mortgagor of slaves cannot enforce a right to redeem, after an *adverse holding* has been assumed by the mortgagee, and continued for five years: *Fenwick vs. Macey's Executors*, 279.
9. Nor after twenty years, (in general,) whether the holding was adverse, or not. *Ibid*, 279, 297.
10. The principle of the statute of limitation does not apply, in chancery, between mortgagor and mortgagee, until a dereliction of the right may be presumed. (See *Mortgage*.) *Fenwick vs. Macey's Executors*, 280.
11. The right of the mortgagor of slaves to redeem, is not limited to five years; he may maintain his bill (where there has been no *adverse holding* of five years duration,) at any time within twenty years after the right accrued. And the mortgagee may enforce payment of his mortgage money, by bill of foreclosure, at any time, within twenty years. *Fenwick vs. Macey's Executor*, 282. Judge Nicholas thinks the right of redemption should be barred after five years. *Ib*. 286.
12. A demand for the hire of mortgaged slaves, accrued five years before the suit, cannot be recovered; because of the bar by lapse of time.—*Fenwick vs. Macey's Executors*, 286.
13. Five years bars the claim, of one who assigned a lease, a security, for the rents which the assignee received and retained for usury. *Fenwick vs. Macey's Executors*, 286.
14. Examination of the question, whether the bar from lapse of time, as recognised in chancery, is adopted in conformity to the legislative will, indicated by acts limiting the times within which suits at law may be brought; or upon considerations of public policy, presumption of dereliction of right, the probable injustice of stale claims &c. by Judge Nicholas, in a *Dissent*, 288.
15. The right of the mortgagor, or mortgagee, of a *slave*, will not be barred by the lapse of time, short of twenty years, unless it is clearly shewn (see page 301) that the holding of the party in possession had become adverse as to the other party: when the character of the possession is thus changed, the statute begins to run, and bars the right in *five years*. *Fenwick vs. Macey's Executors*, 298.
16. The act of 1812, (section 8,) placing unsealed writings on the same footing as those that are sealed, *does* apply to notes that have been placed on the same footing with bills of exchange—consequently (as to the drawers,) they are not within the statute of limitations.—But bills of exchange and endorsements on notes are not within the act, and actions on them are subject to the bar by time. *Clark vs. Schwing*, 335-6.
17. Where a vendee has entered on the land, and retains the possession, under an executory contract, the vendor cannot resist the claim to specific execution on account of the lapse of time. *Eubank vs. Hampton*, 343.
18. A party who has recently recognised an obligation to convey, cannot resist the claim on account of its staleness. *Eubank vs. Hampton*, 343.
19. The motion of a county creditor against a delinquent collector, is not barred by any statute of limitations, nor affected by lapse of time short of twenty years. *Gaither vs. Slaughter*, 369.
20. A credit having been entered upon an execution by mistake, the right to correct it (by issuing a new execution) was not lost by lapse of time,

## LIMITATIONS.

- in eight years—the limitation which bars a writ of error, or an action of assumpsit, does not apply. *Frankfort Bank vs. Markley*, 373.
21. The time, which bars a proceeding in chancery, or motion at common law, to be relieved against the effect of fraud or mistake, is to be computed only from the time when the fraud, or mistake, was discovered. *Frankfort Bank vs. Markley*, 374.
  22. An agreement not to rely upon the statute, set aside—See *Agreement*, 1, or *Todd &c. vs. Wheeler &c.* 401.
  23. Where a party had made an agreement, fatal to his defence, in a suit in chancery, he did not lose his right to have it set aside, by *long acquiescence*, (six or eight years,) without intending to take an advantage of his adversary. *Todd &c. vs. Wheeler &c.* 401.
  24. The right of dower is not embraced by the statute of limitations. But, in chancery, *this*, like 'every new right of action in equity,' must be acted on, at the utmost, within twenty years.' Circumstances—such as would bring the case within the exceptions of the statute,—may constitute exceptions to this rule; as where the demandant was absent from the state when the right accrued, she may assert it at any time within ten years after her return. *Ralls vs. Hughes and Hedgep*, 407.
  25. Where a party had obtained a decree (though a void one) for, and a conveyance in fee absolute, of the inheritance of his deceased wife, under the erroneous idea that *he* was heir of her son, who died shortly after his mother's death, and had sold the land, for a fair consideration, to one who had retained an undisturbed possession *for twenty years*—such alienee is protected in his title and possession, by lapse of time. The right of the true heirs to have the decree corrected, accrued upon its rendition, was not suspended by the fact that the husband, as tenant by the courtesy, and his vendee, had a right to hold the land during his life; and was lost by a failure to assert in within twenty years. *Baseman's heirs vs. Batterton &c.* 432.
  26. Prosecutions for obstructing roads are limited to six months. (See *Pleas and Pleading*, 28.) *Commonwealth vs. Washington*, 446.
  27. The settlement and possession of a tenant is available to his landlord for protection by the seven years limitation law. *Gaines et al. vs. Buford*, 481.
  28. Tenant for life, or one who, by a mistake, is permitted to hold as such, does not hold adversely to the remainder man, or supposed remainder man, and the statute of limitations does not run against him. *Simrall's Administrator vs. Graham*, 574.
  29. A devisee of a slave, having acquiesced in the claim and possession of a supposed tenant for life, who survived him—the limitation did not commence running in bar of the right derived from the devisee, until after the death of the tenant for life, nor then, till administration was granted of the estate of the devisee. *Simrall's Administrator vs. Graham*, 574.

See *Possession*, 10.

## LIS PENDENS.

See *Practice in Chancery*, 22, 23.

## MEDICINES.

See *Sales*, 21.

## MISTAKES.

See *Rescission of Contract*, 4.—*Executions*, 7.—*Limitations*, 21, 28.—*Agreement*, 1.

## MONEY.

Money may be levied on. See *Execution*, 12.—Is not a chose in action. See *Choses in Action and Equitable Interests*, 3.

## MORTGAGES.

1. A tender of the sum due on a mortgage, made to secure a debt to the Bank of the Commonwealth, with ten per cent. interest, after the sale, but within the time allowed by law for redemption, will not divest the Bank of the legal title. The holder of the equity of redemption must resort to chancery, to compel a reconveyance. *Scobee vs. Jones & Lindsey*, 13.
2. The interest of a mortgagee is not vendible under execution. *Cooper &c. vs. Martin &c.* 24.
3. Junior incumbrancers, known to the senior mortgagee, should be parties to his bill for a foreclosure. *Cooper &c. vs. Martin &c.* 25.
4. The holder of the junior mortgage, or incumbrance, or of the equity of redemption, is not bound by a decree of foreclosure to which he was no party—and will be allowed to redeem the estate—although the senior mortgagee had no notice of such claim. *Cooper &c. vs. Martin &c.* 25.
5. Junior mortgagee, made party to the bill of the elder, for a foreclosure, and failing to defend, will be barred. *Cooper &c. vs. Martin &c.* 27.
6. A mortgage to one of several sureties, avails the others nothing. *Cooper &c. vs. Martin &c.* 28.
7. Mortgage by a partner, of his share. See *Partnership*, 2, or *Hodges vs. Holman*, 51.
8. Unrecorded conveyance in fee, has not the effect of a mortgage. See *Conveyances*, 6, 7, or *Graham vs. Samuel*, 167.
9. The interest of a mortgagee is not subject to a levy and sale under execution—neither where he is sole defendant, nor where the attempt is to levy on and sell the entire estate, under an execution against mortgagor and mortgagee. *Buck &c. vs. Sanders &c.* 188.
10. A defendant directed an execution against himself and his sureties, to be levied on an estate that he had mortgaged to them, for their indemnity—which, without the consent or knowledge of the mortgagees, was done, and a sale made of *all the interests*, or the fee simple entire: held that this did not amount to a waiver or release (of which there was no acceptance,) of the mortgagor's equity of redemption, so as to invest the mortgagees, or purchaser at the sale, with the whole title; and the sale, being of the fee simple, was *invalid*. *Buck &c. vs. Sanders &c.* 188.
11. Denial of notice of a mortgage *duy recorded*, is of no avail against the mortgagee. *Buck &c. vs. Sanders &c.* 189.
12. Contracts of sale, intended originally only as securities, are to be treated as mortgages. *Fenwick vs. Macey's Executors*, 271.
13. The possession of a mortgagor, or mortgagee, being amicable, the statute of limitations does not affect the right of either, in equity, or at law. But if the character of the possession be changed from amicable to adverse, the statute then begins to run. *Fenwick vs. Macey's Executors*, 279, 297.
14. The mortgagor of slaves cannot enforce a right to redeem, after an *adverse holding* has been assumed by the mortgagee, and continued for five years. *Fenwick vs. Macey's Executors*, 279.
15. And after twenty years, the claim of either party will be presumed—where nothing appears to rebut the presumption—to have been extinguished, the possession to have been adverse from the beginning, and the right of redemption barred by lapse of time. *Ibid*, 279, 297.
16. A mortgagee in possession (who has not clearly manifested his intention to hold as absolute owner,) has a title and possession not adverse to, nor inconsistent with, the rights of the mortgagor. The mortgagee's estate, in many respects, resembles a trust; and he is generally consid-

## MORTGAGES.

ered in chancery as a trustee: in whose favor the principle of the statute of limitations, or bar by lapse of time, does not apply, until a satisfaction, or dereliction, of the demand secured by the mortgage, must be presumed. *Fenwick vs. Macey's Executors*, 280.

17. The right of the mortgagor of slaves to redeem, is not limited to five years; he may maintain his bill (where there has been no *adverse* holding of five years duration,) at any time within twenty years after the right accrued. And the mortgagee may enforce payment of his mortgage money, by bill of foreclosure, at any time, within twenty years.—*Fenwick vs. Macey's Executors*, 282. Judge Nicholas thinks the right of redemption should be barred after five years. *Ibid*, 288.
18. The mortgagee in possession of slaves, is liable to the mortgagor, for hire;—an allowance for raising to be deducted from the hire. (*See Limitations*, 12.) *Fenwick vs. Macey's Executors*, 286.
19. Points of difference between estates held strictly in trust, and those held under mortgages. Deduction therefrom, that parties to the latter are not, like those to the former, exempt from the effect of the statute of limitations, or bar from lapse of time—by Judge Nicholas, in a dissent—*Fenwick vs. Macey's Executors*, 293.
20. The acts of a mortgagor, or mortgagee, in possession, to have the effect of converting the amicable, into an *adverse*, independent holding, should be direct, unequivocal and overt. *Fenwick vs. Macey's Executors*, 301.
21. Where the debt is, in fact, wholly paid, if the mortgagee still claim a balance, he should be deemed still to hold as mortgagee. *Fenwick vs. Macey's Executors*, 301.

See *Injunction*, 5.

## MOTION.

1. If notice of a motion be given, but not entered in court on the appearance day specified in the notice, it is null, and there can be nothing done upon it. *Miller vs. Boyd—Sheriff*, 272.
2. If a motion is entered on the day specified in the notice, it becomes a cause in court, and stands continued (no order necessary) from day to day, or from term to term, until disposed of. *Miller vs. Boyd*, 272.
3. Motions entered and continued, should be docketed with the other causes, and stand for trial in their turns. *Miller vs. Boyd*, 272.
4. A motion to set aside a sale, overruled, will not preclude a party from showing that the sale was fraudulent and void, upon other grounds, not contained in the notice, nor attempted to be proved on the trial of the motion. *Sanders' heirs vs. Buskirk*, 411, 412.

## NEGROES.

For matters relating to *Slaves*, see that title.

1. The act (of 1808.) under which persons of color emigrating to this State, may be compelled to depart, is a penal law: it dispenses with the trial by jury, and is so far unconstitutional. *Doram &c. vs. Commonwealth*, 331.
2. Persons of color charged with emigrating to this State, should be tried separately: a joint proceeding against several, is irregular. *Doram &c. vs. Commonwealth*, 331.
3. The Court of Appeals has jurisdiction to revise the proceedings of county courts, in cases of persons of color charged with migrating to this State. *Doram &c. vs. Commonwealth*, 331.
4. The master, overseer &c. of a plantation who permits any slave of another to be and remain on his plantation more than four hours, without leave of his owner, or permits more than five slaves to be on his plantation at a time, besides those belonging there, incurs a penalty, of two dollars for each—but is not liable for an injury done to any such slave.

## NEGROES.

while there, *by another person*. (See *Consequential Damages*.) *Bosworth vs. Brand*, 377.

5. A free man of color—though he cannot be a *witness in any case*, except where none but negroes, mulattoes, or indians are parties, may, by his own oath, require a white man to give security to keep the peace.—*Commonwealth vs. Oldham*, 466.
6. The oath or affidavit of a free man of color, *party*, may be received in any case where the oath or affidavit of a party is required or admissible. *Commonwealth vs. Oldham*, 467.

## NEW TRIAL.

1. The act (of 1796) providing, "that not more than two new trials shall be granted to the same party in the same cause," does not so operate as to prevent the Court of Appeals from examining the questions of law, reversing, and remanding the cause *for a new trial*, after three or more verdicts for the same party. *Ball vs. Lively*, 62.
2. A verdict and judgment being for a mere trifle (seventeen cents) too much, is not sufficient ground for a new trial, or reversal: *de minimis non curat lex*. *Caldwell vs. Roberts*, 357.
3. The affidavit of a *party* (uncontradicted) that a juror was related to his adversary, is sufficient evidence of that fact, upon a motion for a new trial. *Dailey vs. Gaines*, 529.
4. The allegations of an affidavit, upon a motion for a new trial, may be met by counter affidavits,—to take which, time may be allowed, if required. *Dailey vs. Gaines*, 529.

## NON EST FACTUM.

See *Evidence*, 16.

## NONSUIT

See *Evidence*, 14.

## NO PROPERTY.

Return of no property and proceedings to subject *choses in action* &c.—

See *Choses in Action and Equitable Interests*.

## NOTES, promissory.

1. The assignment of a note to the Bank of Kentucky, is *prima facie* evidence of its having been discounted, and thereby placed on the footing of a bill of exchange. *Clark vs. Schwing*, 334.
2. A party to such note, who has taken it up, has a right to strike out his endorsement, and proceed upon it, against those who were liable before him, for the payment. *Ibid*, 334.
3. The act of 1812 (§9) placing unsealed writings on the same footing as those that are sealed, *does* apply to notes that have been placed on the same footing with bills of exchange—consequently (as to the drawers,) they are not within the statute of limitations. *Clark vs. Schwing*, 335.
4. Neither bills of exchange, nor endorsements on notes, are within the act placing certain unsealed writings on the same footing with those that are sealed, and actions on them are subject to the bar by the statute of limitations. *Clark vs. Schwing*, 336.
5. When a judgment has been recovered against a party to a bill of exchange or note, no other action can be maintained against the same party on the same bill or note.—If one under a subsequent liability (as endorser,) on such bill or note, pays it, his remedy, against the party who had been sued, is on the *implied assumpsit*, or by taking the control and use of the judgment. *Clark vs. Schwing*, 336.
6. A *note* (made before the act that gives notes the dignity of sealed writings,) without further description, must be presumed to be a simple contract. *Craig vs. Whips*, 375.



## NOTES.

7. A note, or bond, given gratuitously, cannot be enforced in equity. *Bibb vs. Smith &c.* 582.
  8. If a note be sold, the consideration stipulated to be paid for it may, in general, be recovered, though the note prove to be of no value—but there is an implied warranty that it is genuine, and if it is forged, there is a failure of consideration, and there could be no recovery of that agreed to be paid for it. *Marshall vs. Peek &c.* 612.
- See *Limitations*, 16.

## NOTICE.

1. Want of notice, will not avail the purchaser under a devisee, against the claim of a child pretermitted in the will, for contribution out of the estate purchased. *Haskins &c. vs. Spiller*, 175.
2. Want of notice to the defendant, of an application for a writ of error *coram vobis*, may be ground for discharging the supersedeas; but is not good cause for quashing the writ, or for awarding damages upon its dismissal. *Combs et al. vs. Carter*, 178.
3. Want of notice of a mortgage on an estate purchased at a sale under an execution against the mortgagor, may, in some cases, entitle the purchaser to elect to hold the equity of redemption. *Buck &c. vs. Sanders &c.* 189.
4. The notice, or summons, or order authorizing a summons, to the owner of a ferry, to show cause against its being discontinued, must apprise him of the nature of the complaint. *Brown vs. Givens*, 260.
5. The appearance of the owner of a ferry, summoned to show cause against its discontinuance, does not waive the necessity, of due notice to him, of the grounds of the motion. *Brown vs. Givens*, 261.
6. Notice of an equity does not effect the rights of a party in a trial at law. *Milhon vs. Riley et al.* 361.
7. A statute requiring notice to be given, and the service of it to be proved in a particular mode, must be strictly pursued. A sheriff's return of "executed," may not be substituted, where the act says, there shall be an affidavit produced, that notice in writing has been given. *Newby and wife vs. Perkins et al.* 440.
8. Where an act requires a notice to be given and proved in a prescribed mode, a previous general law, providing that any notice may be served by a sheriff, does not apply. *Newby &c. vs. Perkins et al.* 441.
9. A partition among parceners made under an order of a county court, without legal notice to all interested, is unauthorized. *Newby &c. vs. Perkins et al.* 441.
10. Notice to a debtor of a partnership, that one partner, upon the dissolution, had agreed to surrender his right to make settlements, would bind the debtor, and the notice might be inferred from circumstances. *Combs vs. Boswell &c.* 475.
11. Notice to quit. See *Landlord and Tenant*, 2, 3.
12. Notice to creditors of unrecorded conveyances. See *Conveyances*, 6, 7. See *Depositions*, 1, 3.—*Mortgages*, 4, 11.—*Motions*, 1, 2, 3.—*Lien*, 7.

## NOVATION.

See *Surety and Principal*, 2.

## OATH, of a colored man.

See *Negroes*, 6.

## OBLIGATIONS, OBLIGOR, AND OBLIGEE.

See *Contracts*.—*Covenant*.—*Notes, promissory*.

## OCCUPANTS OF LAND.

See *Limitations*, 7.—*Improvements on Land*, 1, 2.

## OFFICE AND OFFICER.

1. Where one who claims an office, moves a court in which the services are required, to be qualified and recognised as the proper officer, another person who claims the same office, may be admitted as a party to the motion; and either may have a writ of error to correct the judgment, to which the other may be made a defendant. *Bruce vs. Fox*, 449.
2. One claiming an office may move the court where the services of the officer are required, for leave to take the oaths and proceed in the duties, may be heard *ex parte*, and may have a writ of error, *ex parte*, to reverse the decision upon his motion. *Bruce vs. Fox*, 450.
3. An office may be created by statute, the term of which is fixed by the constitution; and if the constitutional term be during good behavior, the officer receiving the appointment, may hold it as long as the statute remains in force, and no longer—whether it be repealed, expires by its own limitation, or is continued in force by a subsequent act. *Bruce vs. Fox*, 453.

See *Clerks of Courts*, 5 to 12 inclusive.—*Attorney for the Commonwealth*, 3.

## OFF-SET.

See *Set-off*.

## OPENING AND CONCLUDING SPEECH.

See *Practice in Suits at Law*, 24.

## OUSTER.

See *Possession*, 16.

## PARCENERS.

See *Warranty of Title to Land*, 2.

## PARENT AND CHILD.

1. A party buys an estate, pays for it, and has the title made to his children; his creditors file a bill to subject it to the payment of his debt: the debt having been contracted before the purchase; the answers of father and children denying that it was an advancement to them, and other circumstances indicating an intent to defraud creditors—held that the estate was liable for the debt. *Doyle &c. vs. Sleeper &c.* 531. Dissent of Judge Nicholas, upon this question, 551.
2. A parent may provide for the support and education of his children, notwithstanding his indebtedness. *Doyle &c. vs. Sleeper &c.* 534.
3. If a party purchase property, pay for it with his money, and cause the conveyance to be made to his children as an *advancement*, it will be good, and the property will not be liable to the father's debts. But if it appears that the conveyance was not intended as a *bona fide* advancement, but to defeat creditors, it will be deemed fraudulent, and a sale of the property, to pay the father's debt, may be decreed. *Doyle &c. vs. Sleeper &c.* 536.
4. That the intention of a father who procures an estate, purchased and paid for by him, to be conveyed to his children, was fraudulent, cannot be inferred from the mere fact of his indebtedness at the time; but slight additional circumstances will justify that inference. *Doyle &c. vs. Sleeper &c.* 540.
5. A conveyance to a stranger without consideration, or a purchase in his name, creates a resulting trust in favor of the grantor, or payer of the purchase money—*aliter* where the conveyance is to, or the purchase in the names of, infant children. The implication from such purchase, is, that it was made for their advancement. This implication has never been destroyed in favor of a purchaser from the father. Neither should it be in favor of creditors, on the ground that the purchase was

## PARENT AND CHILD.

so made to defraud them. It is too well settled, to be now called in question, that the donee of money cannot be pursued by the creditors of the donor. A purchase in the names of infant children, is but a donation of the purchase money, and neither prior or subsequent creditors can subject property so purchased. The question has not been affected by the statutes subjecting *choses in action* and equitable interests, after a return of "no property" to a *fi. fa.* *Opinion of Judge Nicholas, dissenting from a majority of the court. Doyle &c. vs. Sleeper &c.* 551.

See *Fraud*, 10, 11, 13, 14.

## PARTIES, to suits in Chancery.

1. A remote grantor (or his heirs) from whose vendee the contending parties both derive title, need not be made a party to their suit. *Hanly &c. vs. Blackford*, 4.
2. Junior incumbrancers, known to the senior mortgagee, should be parties to his bill for a foreclosure. *Cooper &c. vs. Martin &c.* 25.
3. In a bill upon a lost note, signed by a principal and surety, the principal is a necessary party—or his representatives, if he be dead, although he may have died insolvent. *Long vs. Dupuy*, 104.
4. One makes a bargain for the sale of land, receives part of the pay, and dies: his vendee transfers the bargain to a third party, and with the latter, the guardian of the decedent's children enters into a written agreement, stipulating that his wards shall make a title as soon as a balance of the consideration is paid: the decedent's vendee, and his heirs, (the guardian's wards,) were necessary parties. *Williams vs. Wilson*, 159, 162.
5. The after-born child, pretermitted in the will of the father, may recover, in chancery, from each devisee, or from the purchasers under a devisee, the proportion which such devisee is bound to contribute, *without making the other devisees parties.* *Haskins &c. vs. Spiller*, 175.
6. Want of notice of a mortgagee on an estate purchased at a sale under an execution against the mortgagor, may, in some cases, entitle the purchaser to elect to hold the equity of redemption—hence he is a proper party to a bill to foreclose the mortgage. *Buck &c. vs. Sanders &c.* 189.
7. Executor (by intermarriage) is a necessary party to a bill against the executrix, for settlement and distribution. *Vance &c. vs. Campbell's heirs*, 229.
8. The party who fears the loss of land, by superior title, may file his bill *quia timet* against his vendor, and may bring those whose title he fears before the court, and have the controversy settled—it is the duty of *the complainant* to bring the necessary parties before the court.—*Simpson &c. vs. Hawkins &c.* 309, 328–9. Judge Nicholas dissents on the latter point, 319.
9. By the agreement of the parties in court, the necessity of bringing other *indispensable* parties before the court, was waived: held that the agreement ought not to prejudice those by whom it was improvidently made. *Simpson &c. vs. Hawkins &c.* 313.
10. To the cross bill of the assignee of a note, whose judgment on the note is enjoined, upon an equity against the obligee, for indemnity, his immediate assignor is a necessary party. *Curd &c. vs. Lewis*, 354.
11. Defendants to a cross bill (other than complainants in the original bill) must be summoned, notwithstanding they may have appeared in the cause in some other attitude; otherwise the decree may be reversed for want of proper parties. *Johnson &c. vs. Johnson's heirs &c.* 369.
12. The assignor of a note is not a necessary party to the bill of the promisee

**PARTIES, to suits in Chancery.**

- nor, seeking to enjoin the judgment, upon the ground of payment before the assignment, and failure to defend at law. *Craig vs. Whips*, 375.
13. A covenantor, with notice of an assignment, should make the assignee a party to his bill to subject the land to the payment of the purchase money—otherwise, the sale may vest the title in a *bona fide* purchaser, leaving the covenantor liable to the assignee. *McDonald vs. Ford*, 465.
  14. Parties consenting to a separate hearing of a cause, as between themselves (when there are other parties,) waive any objection there may be to that course; and cannot avail themselves of the irregularity—if any—upon an appeal. *Wickliffe vs. Clay*, 589.
  15. A writing containing mutual covenants is not assignable *by law*, and the transfer passes only the equitable right: hence, in a chancery suit upon such a writing, by a remote assignee, the covenantee is a necessary, and the intermediate assignees are proper, parties. *Wickliffe vs. Clay*, 594.
  16. Where there is a want of necessary parties, this court will not, in general, consider the merits of the case. But, at the request of the parties here, the merits, as between them, may be decided. *Wickliffe vs. Clay*, 594.

**PARTIES, to Actions at Law and Motions.**

See *Pleas and Pleading*, 8.—*Office and Officer*, 1, 2.

**PARTITION OF LAND.**

See *Division of Land*.

**PARTNERSHIP.**

1. Each partner has a lien, by operation law, upon the partnership effects, for any balance in his favor, upon the partnership accounts. *Hodges vs. Holeman*, 53.
2. The lien of a partner, for a balance (on the partnership accounts,) is not an incident of the legal title to the effects; but results from the partnership, and is not affected by the mortgages of either partner on his share. *Hodges vs. Holeman*, 51.
3. The lien of a partner on the partnership effects, for a balance due him on the partnership accounts, is not limited to the balance accrued at the time of the dissolution, but is co-extensive with the transactions on the joint account. *Hodges vs. Holeman*, 55.
4. The authority of each partner to settle unclosed affairs of the firm, continues after the dissolution; and a payment made to one; an agreement made by one to set off a debt due the firm against his private debt, or other arrangement with one only, for a settlement, binds all. But if any partner, upon the dissolution, agrees to surrender this authority, settlements by him with *those having notice* of his agreement, will not bind the others. The notice may be inferred from circumstances. *Combs vs. Boswell &c.* 475.

**PATENTS FOR LAND.**

See *Land Titles*.

**PAYMENT.**

1. Where a bank discounts a note for the purpose of renewing a former loan, *in the usual way*, the negotiation seems to be equivalent to a new loan, and an independent payment of the old debt—not merely giving one note as satisfaction of another. *Letcher vs. Bank of the Commonwealth*, 84.
2. A payment to the holder of an obligation, may be presumed—when it does not appear at what time or on what consideration it was made—

**PAYMENT.**

- to have been made on account of the obligation. *Butler vs. Triplett*, 154.
3. *Solvit ad diem* was a good plea, at common law, to an action on a bond with a condition; and *probably* in this state, to an action on a single bill—without an acquittance under seal. *Craig vs. Whips*, 375.
  4. Payment after the day, was not a good plea before the statute. *Ib.* 375.
  5. To an action of assumpsit, or debt on simple contract, payment, total or partial, might be pleaded, or given in evidence under the general issue. *Craig vs. Whips*, 375.

**PENDENTE LITE SALES.**

See *Sales*, 16, 17, 18.

**PERSONS OF COLOUR.**

See *Negroes*.—*Slaves*.

**PLEAS AND PLEADING.**

1. Plea, to a *scire facias* on a judgment, that the agreement by which a condition was annexed to the judgment, was made while the party was an infant, is insufficient, and the issue, on the allegation of infancy, is immaterial. *Lowry vs. Drake's heirs*, 46.
2. If the plea be bad, and an immaterial issue be formed on the subsequent pleadings, and found for plaintiff, the judgment will stand; for the defendant, having committed the first fault, cannot take advantage of the immaterial issue. *Lowry vs. Drake's heirs*, 47.
3. Pleas are to be taken according to the common understanding of the terms used. Plea averring an agreement that defendant should 'pay in the clerk's office, to be received by the lessors,' &c. and then averring, he did deposit (the sum) with the clerk, *according to his undertaking*, (without saying for the plaintiff,) is sufficiently certain. *Lowry vs. Drake's heirs*, 47.
4. Where there was an agreement, endorsed on a covenant, for the payment of money, that obligor should remove all liens, &c. from certain property, before the obligee should be forced to pay—a plea averring an existing state of facts, from which a lien might thereafter arise, (or might not,) is insufficient. *Hodges vs. Holeman*, 50.
5. The plea (in such case) must shew the nature and character of the lien. *Ibid.*, 51.
6. Plea, that a lien was *asserted*, held to be bad. *Hodges vs. Holeman*, 52.
7. A suit may be maintained, against a single obligor, upon a writing purporting to be the joint bond of the defendant and another; and a count which describes the writing simply as the bond of the defendant, or a count which describes it as being signed by another, as well as the defendant, will be sufficient. *Allin, Executor &c. vs. Shadburne's Reps.* 69.
8. The same person cannot be both obligor and obligee, nor plaintiff and defendant. *Allin, Executor &c. vs. Shadburne's Representatives*, 72.
9. If two pleas, *alike in substance*, are filed, and issue is taken on one, a failure to notice the other, is not cause for reversal. *Cain et al. vs. Flynn*, 144.
10. A *similiter* is not indispensable—especially after verdict. *Cain et al. vs. Flynn*, 144.
11. *Plene administravit* is a good plea in bar, to an action against executors, upon a covenant of warranty to the extent of their assets. *Maniffee vs. Morrison's Executor*, 208.
12. Plea of *nul tiel record*, should not conclude to the country—the issue is to be tried by the court, not by a jury. *Boucher vs. Williamson*, 227.
13. The only proper issue upon a traverse is whether the inquisition is true, or not. Dilatory pleas are not admissible. *Boucher vs. Williamson*, 227.
14. A plea, in bar of the action, which sets up a defence to a part only, (as the interest,) is bad on demurrer. *Walker's Executors vs. Ogden*, 253.

## PLEAS AND PLEADING.

15. A declaration in debt, for a *devastavit*, averring that *estate* of intestate came to the hands, possession, "*or knowledge*" of the administrator, sufficient &c. (not, that *goods and chattels*, sufficient &c. came to his hands to be administered &c.) is bad on demurrer. *Griffith et. al. vs. Commonwealth*, 271.
16. *Plene administravit* is a good plea (by statute,) to an action of debt for a *devastavit*. *Griffith vs. Commonwealth*, 271.
17. Plea of *nil debet*, or of covenants performed, to a declaration in debt, for a *devastavit*, is bad, on demurrer. *Griffith vs. Commonwealth*, 271.
18. The plaintiff declared in debt, that defendant made his note to plaintiff, which was afterwards discounted and assigned &c.: that defendant failing to take it up at maturity, the plaintiff paid it, of which defendant had notice; whereby he became bound to pay the plaintiff &c.: held that this count is on the note, and not on an implied assumpsit, resulting from the payment. *Clark vs. Schwing*, 338.
19. A plea to the whole declaration, if insufficient as to any count, will not be sustained. *Clark vs. Schwing*, 336.
20. A plea (of limitation,) which shows that the plaintiff's action is misconceived, and that (though the present action is not) the only appropriate action would be barred—is insufficient. *Clark vs. Schwing*, 337.
21. Form of a declaration demanding dower, and the mesne profits—held sufficient for the former object, not for the latter. *Taylor vs. Brod-rick*, 345, 347.
22. A plea, which may be taken as true, and yet some cause of action remain, is bad. *Fowler et al. vs. Commonwealth*, for *Taylor*, 358.
23. A plea requiring proof of an assignment, must be accompanied with an affidavit that defendant believes the assignment is forged. *Jones vs. Cromwell*, 385.
24. If the want of a sufficient assignment is relied on, the defendant should crave oyer of the writing and assignment; and if none be shown, the plaintiff fails; if an insufficient one, it is ground of demurrer. *Jones vs. Cromwell*, 385.
25. Payment of the consideration was a condition precedent to the performance of the defendant's covenant; the declaration averred, that "he had been fully paid;" the plea, that, "neither K, O or C had paid:" they being covenantee, and the only assignees, held that the plea contained a sufficient negative of the averment, and was good. *Jones vs. Cromwell*, 385.
26. A declaration which avers sundry assignments of the covenant sued on, of which defendant "had due notice," and charges a non-performance to the assignee who held it when the condition precedent was performed, and the breach occurred, is sufficient, without averring non-performance to the covenantee or plaintiff. *Jones vs. Cromwell*, 385.
27. In a declaration against a sheriff for failing to pay over commonwealth's paper, an averment that he failed to pay "the amount," implies a charge of failing to pay in that paper, and is sufficient. And where it is averred, that he collected it "by virtue" of the execution, the legal deduction is, that he received it while the execution was in his hands, and in force. *Canterberry vs. Commonwealth*, for *Smith &c.* 416.
28. The bar to a penal prosecution need not be pleaded—it is available on the trial; or to quash the presentment where it appears on its face.—*Commonwealth vs. Washington*, 446.
29. The plea of a covenantor, sued by an assignee, must show that the facts pleaded occurred before notice of the assignment. *McDonald vs. Ford*, 465.
30. Pleas in abatement are to be construed strictly, and are not amendable. *Thompson vs. Neal*, 469.

PLEAS AND PLEADING.

31. Plea, that bond for cost, with surety who is a resident, had not been given, is insufficient; as he may have been so when the bond was given. *Thomson vs. Neal*, 469.
32. A declaration in slander charging words as having been spoken in the third person, is sufficiently sustained by proof of words spoken in the second person. *Dailey vs. Gaines*, 529.
33. An officer sued, in detinue, for a chattel that he has taken and holds under an order of court, must show, by his plea, how he holds it; evidence of his *right to hold*, is not admissible under a plea of *non detinet*. *Cromwell vs. Clay*, 579.
34. A plea of a *failure* of consideration would not be good when the consideration (such as it was,) was executed. *Marshall vs. Peck et al.* 611.
35. Different plaintiffs cannot join, where the cause of action is not joint—a *family* of slaves cannot join in an action for their freedom. *Beatty vs. Judy &c.* 103.

See *Writ of Right*, 1.

POSSESSION.

Possession of *Slaves and other Chattels*, 11, 12, 13, 14, 15; the other numbers of this title relate to Land.

1. Possession in the plaintiff, in trespass *quare clausum fregit*, at the time of the injury, or of the suit brought, is essential. There can be no recovery where the possession in fact was with the defendant *continually*—although tortiously, and against the will of the plaintiff. *Wilson vs. Bibb*, 10.
2. Defendant in ejectment, without either title, or twenty years possession, is not protected by lapse of time. *Norton et al. vs. Sanders et als.* 14.
3. The acquisition of the title of a stranger, *by a tenant*, will not destroy the relation between him and his landlord,—whose title he cannot question without restoring the possession. *Norton et al. vs. Sanders et als.* 15.
4. After a judgment in ejectment, the defendant buys the land at a sale by the sheriff, under an execution against the plaintiff, and then agrees (for a consideration,) to release it to the plaintiff, abandons the possession, and, sometime after, makes the deed. In the mean time, a stranger enters, by what right, it does not appear. Held that *his* possession was the possession of *the plaintiff*, not of the defendant and those claiming under him. *Norton et al. vs. Sanders et als.* 16.
5. A deed made to carry into effect a contract for the sale of land, made while there was no adversary possession, is not tainted with champerty, although the land be held adversely at the time the deed is made.—*Norton et al. vs. Sanders et als.* 17.
6. After a judgment of eviction, the plaintiff, or his vendee, before or after the delivery of possession—may make a lease of the premises, which the tenant may accept, and thus change his tenure from adverse to amicable, and be precluded from disputing the title of his lessor. *Ball vs. Lively*, 65.
7. If the sheriff, in executing a *habere facias*, deliver more land than the judgment is for, the delivery is good to the extent of the recovery,—and void for the surplus. *Ball vs. Lively*, 66.
8. The possession delivered under a *habere facias*, has relation back to the commencement of the suit, and although the holding of the tenant *during the time between service of the declaration and notice, and execution of the habere facias* was adverse to the plaintiff, that period cannot be included in the time relied on to bar the plaintiff (or those claiming under him) in any subsequent contest for the land. *Ball vs. Lively*, 66.
9. Where the junior grantee extends his improvement over the line of the elder grantee in possession, and afterwards acquires a third title para-

## POSSESSION.

- mount to both, the *possession* under the new title, will not be deemed to extend over the whole claim, but will be restricted to the enclosure. *Ball vs. Lively*, 66.
10. Bringing an ejectment, and enclosing part of the land, are independent acts, which cannot be so connected together as to aid each other in making out a term of possession. *Ball vs. Lively*, 67.
  11. If a party in possession of slaves claimed by another, acknowledges the title of, and holds under the latter, such holding is not adverse, and the statute of limitations does not run against the claim—if admitted within five years. *Waller vs. Demint*, 92.
  12. Any person who *has had* the possession of, and has sold, used, or detained, the property of another—either for himself, or as the agent, or servant of a stranger, is liable, in detinue, to the true owner for the property, or its value—whether he was, or was not, conscious of the right of the true owner—and whether he had, or had not, parted with the possession, before suit brought. *Pool vs. Adkisson et al.* 111.—Different Opinion and Argument of Judge Underwood, 121—142.
  13. Possession of a bailee, and his liability. See *Bailment*, 1, or *Pool vs. Adkisson et al.* 117.
  14. Detinue may be maintained against a defendant who has had possession of the chattel sued for, but *has parted with the possession* (without being divested of it by authority of law,) *before the date of the writ.* *Pool vs. Adkisson et al.* 118.
  15. Continued possession of donor of a chattel after the gift. See *Limitations*, 5, or *Daniel vs. Daniel*, 238.
  16. When a grantee enters upon his land, his possession, by construction of law, extends to the boundaries of his grant; and if a junior grantee enters on the land, the elder will be ousted of so much as the junior actually encloses, and no more; for, though an *actual* entry will, a *constructive* entry *will not*, oust a tenant whose possession is merely constructive. *Shrieve vs. Summers*, 239. *Mass et al. vs. Currie et al.* 267.
  17. Of the restoration of Possession upon the rescission of a contract. See *Rescission of Contracts*, 8, or *Walker's Executors vs. Ogden*, 251.
  18. The possession of one tenant in common is deemed the possession of all—nothing appearing to the contrary. *Moss et al. vs. Currie et al.* 267.
  19. Twenty years adverse possession may be relied on, without a grant or conveyance. *Simpson &c. vs. Hawkins &c.* 306.
  20. After thirty years quiet possession, apprehensions of adverse claims should not be indulged. A grant may be presumed when an entry, survey, and thirty years possession, are shewn. *Per Chief Justice.*—*Simpson &c. vs. Hawkins &c.* 326.
  21. A devisee being entitled, by will, to a specific quantity of land, to be allotted to her; the allotment having been made, and possession taken, to hold in severalty; held, that—whether the land so allotted was such as passed by the will, or, being acquired after its publication, descended to the heir—the possession so taken and held by the devisee, was *adverse* to the heir, co-devisees and all others, and protected by the statute.—*Swearingen vs. Fields et al.* 390.
  22. A vendee is not required to go out of the State, to notify a nonresident vendor, that he renounces the contract—he may abandon the possession without giving notice. *Taylor vs. Porter*, 424.
  23. After twenty years possession, an executory contract appearing, a conveyance may be presumed; and after a much longer time (thirty seven years) the presumption may be acted upon with confidence, and will not be rebutted by the continued nonresidence of the vendor. *Woodson's Administrators and heirs vs. Scott*, 472.
  24. The settlement and possession of the tenant is available to his landlord



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for protection by the seven years limitation law. *Gaines et al. vs. Buford*, 481.

25. The possession of a junior patentee who enters upon a part of the land, unless his entry is in the name of the whole, is restricted to his actual occupancy; and the right of entry of the elder patentee, and those claiming under him, upon the residue, is not talled. *Gaines et al. vs. Buford*, 481.
26. Where it appears that a tenant in possession entered under an executory contract, a jury may infer a legal conveyance from facts which do not amount to a legal presumption of a deed: but not from the single fact of nineteen years possession. *Craig vs. Austin et al.* 517.
27. A party in possession may rely upon his right as adverse until it is shewn by proof, that he is estopped, by having entered under an executory contract, as a quasi tenant, or the like. *Craig vs. Austin et al.* 517.

See *Entry*, 1.—*Limitations*, 28, 29.

## PRACTICE IN THE COURT OF APPEALS.

1. This court will not reverse for the admission of *relevant* testimony at an *inappropriate time*. *Wilson vs. Bibb*, 9.
2. Papers put with those belonging to a cause, but not made exhibits by the pleadings, nor read upon the trial, are no part of the record in this court. *Commonwealth vs. Chambers*, 12.
3. Where the bill of exceptions does not exhibit *all* the proof, this court cannot say that the verdict was contrary to evidence. *Norton et al. vs. Sanders et als.* 14.
4. An example of instructions of the circuit court, deemed erroneous, but abstract and *harmless*: therefore not cause for a reversal. *Norton et al. vs. Sanders et als.* 15.
5. The act (of 1796,) providing, "that not more than two new trials shall be granted to the same party in the same cause," does not so operate as to prevent the Court of Appeals from re-examining the questions of law, reversing, and remanding the cause *for a new trial*, after three or more verdicts for the same party. *Ball vs. Lively*, 62.
6. Record of *scire facias*, admitted *without objection*, in the court below, as proof of the original judgment, will be allowed the like effect here. *Ball vs. Lively*, 67.
7. But *two* judges sitting here, and differing in opinion, the decision of the circuit court, on the point of difference prevails. *Letcher vs. Bank of the Commonwealth*, 82.
8. Bill of exceptions shewing that the ownership of goods was not contested, but admitted, in the court below, received as sufficient evidence of the fact here. *Bell et al. vs. Wood*, 148.
9. If a bill of exceptions, signed after the trial, *without objection*, uses the present tense ('excepts') implying that the exception is then first taken, it will be presumed, in this court, that the right to except was reserved. *Foree vs. Smith*, 151.
10. Depositions were improperly admitted against defendants in ejectment, because their co-defendant and warrantor had not notice—but the *fact* of his being warrantor *not appearing by the bill of exceptions*, this court would not have reversed for that alleged error. *Woodard &c. vs. Spiller*, 180.
11. The *appellee* may bring up the record, and submit it as a *delay case*, before the expiration of the time allowed the appellant to file the record. But he recovers no costs, although successful. *O'Hara vs. Lexington and Ohio Rail Road Company*, 232.
12. An order of a court, appointing a receiver, to keep up and let out a ferry, will be presumed here—nothing appearing to the contrary—to be regular and valid. *McCauley vs. Givens*, 268.

## PRACTICE IN THE COURT OF APPEALS.

13. Judgment reversed, because it *may* (though it does not appear that it will) operate to the injury of the appellant. *Taylor vs. Brodrick*, 349.
14. Papers not admissible were read at the hearing of a chancery cause; but their only effect was to prove facts amply established by other evidence—the cause is not reversed for that error. *Curd &c. vs. Lewis*, 352.
15. A verdict and judgment being for a mere trifle (seventeen cents) too much, is not sufficient ground for a new trial, or reversal: *de minimis non turet lex*. *Caldwell vs. Roberts*, 357.
16. A cross bill *against the complainant only*, comes up by appeal or writ of error to a decree on the original bill. *Stansberry vs. Simmons*, 415.
17. To a motion to set aside a sheriff's sale, for irregularity appearing in the return, all persons interested on the record, are parties. And the plaintiff in the execution (or any party) may prosecute his writ of error to the judgment on the motion. *Wilson vs. Percival*, 419.
18. This court having, by two decisions, settled the identity of an object called for in an entry, will, in subsequent cases, *upon the same evidence*, adhere to the former decisions—though the opposing evidence may seem to the present judges to preponderate. *Morgan's heirs vs. Parker*, 445.
19. A cause may be reversed for erroneous instructions, notwithstanding the verdict may appear to be right upon the proof. Per Judge Underwood. *Gaines et al. vs. Buford*, 502.
20. Parties in this court may waive objections to the preparation of a chancery cause, in the court below, and have a decision here on the merits. And parties who being infants, answered by guardian *ad litem*, may thus sanction such answer. *Doyle &c. vs. Sleeper &c.* 541.
21. If a former decree is relied upon as a bar, it must be duly pleaded; prayer, in an answer, that “the *pleadings and proofs*, in a former suit, may be made a part of this cause,” does not present *the decree*—and although it be copied in the transcript, it will not be regarded in this court. The answer being that of an infant does not constitute an exception to this rule. *Galloway vs. Hamilton's heirs &c.* 576.
22. It is the duty of a circuit court to see that the rights of infants are protected, and every fair defence made in their behalf.—In this court, the rules applicable to other cases must be applied to theirs. *Galloway vs. Hamilton's heirs &c.* 576.
23. An appeal granted, becomes a nullity upon a failure to give the appeal bond as required; and will not be considered in this court. *Wickliffe vs. Clay*, 589.
24. Where there is a want of necessary parties, this court will not, in general, consider the merits of the case. But, at the request of the parties here, the merits, as between them, may be decided. *Wickliffe vs. Clay* 594.
25. The *charges* against a clerk, prosecuted for breach of good behavior, must be supported *by affidavit*, before they can be filed. *Commonwealth vs. Rodes*, 595.
26. The summons, against the defendant, should recite the charges at length. *Ibid*, 595.
27. The information cannot be amended by adding charges. *Ibid*, 595.
28. Upon the defendant's appearing, a day will be fixed for trial. *Ibid*, 595.
29. The information against a clerk must state the charges *specifically*—general charges will not be regarded. *Ibid*, 597.
30. Upon the trial of a clerk for misbehavior in office, unless a majority of the judges *concur*, as well as to the *cause* for which he should be removed, as in the propriety of such a sentence upon the whole case, he must be acquitted. *Commonwealth vs. Rodes*, 604.
31. Where a *joint* action is brought against several, who are only liable

## PRACTICE IN THE COURT OF APPEALS.

*separately*, and they obtain an erroneous judgment in bar, that would preclude the plaintiff in another suit, it will not be affirmed, because of *his first error* in pleading; but will be reversed, and remanded for new proceedings commencing with the first error. *Marshall vs. Peck et al.* 616.

See *Costs*, 3, 7, 11—*Appeals*, 4.—*Writ of Error*, 1.—*Parties to Suits in Chancery*, 14.

## PRACTICE IN CHANCERY.

1. No proof is necessary against those who admit the allegations of a bill, by failing to answer. *Hanly &c. vs. Blackford*, 4.
2. A decree should not be reversed for the improper admission of a deposition, *if there was sufficient proof without it.* *Hanly &c. vs. Blackford*, 4.
3. A remote grantor (or his heirs) from whose vendee the contending parties both derive title, need not be made a party to their suit. *Hanly &c. vs. Blackford*, 4.
4. Admissions of items of account, before a commissioner, should appear in proof. *Commonwealth vs. Chambers*, 12.
5. Upon a bill by the purchaser of a mortgaged estate, to be relieved from the decree and claim of the mortgagee, and for such relief as he may be entitled to, he may be *permitted to redeem*, under a general prayer. *Couper &c. vs. Martin &c.* 27.
6. Affirmation, in an answer, that defendant does not "*recollect*" having done an act, is not tantamount to a direct and unequivocal denial, nor to a declaration that he does not *believe* he did it. *Talbot vs. Sebre's heirs &c.* 56.
7. An authority to sign the name of a party to a title bond, may be presumed, (in equity) from his knowledge of, and acquiescence in, the sale—when the denial of the answer is not wholly unequivocal. *Talbot vs. Sebre's heirs &c.* 56.
8. Want of averment—in a bill filed to avoid the statute of limitations, on the ground that the defendant had countenanced complainant's claim and encouraged hopes of compromise—that such acts of the defendant were done within five years, is itself ground of demurrer to the bill.—*Waller vs. Demint*, 92.
9. The value of an interest in slaves involved in a suit in chancery, should be ascertained by a jury. *Smiley vs. Smiley's Administrator &c.* 97.
10. Allegations in a bill, of the death and insolvency of an individual—facts not presumed to be within the personal knowledge of the defendant, nor charged to be so, nor noticed in his answer—should not be taken as true, without proof. *Long vs. Dupuy*, 105.
11. Pleas in abatement *in chancery* do not have the effect of dismissing the bill absolutely. That complainant is a non-resident, and has not given security for costs, being pleaded, in chancery, he may give the security *nunc pro tunc*, and save the dismissal. *Haskins &c. vs. Spiller*, 176.
12. Division of Lands recovered—Rents, Improvements, &c. See *Division of Land*.
13. A party purchased property at a sheriff's sale, and afterwards applied to the chancellor to be relieved against the sale bond, alleging that he bought upon the representations of the plaintiff, that the property was subject to the execution, when, in fact, it belonged to a stranger: held, that he must make out a clear case;—doubt and uncertainty as to the title of the defendant in the execution, or the extent of his interest in the property levied on, will not entitle the complainant to relief. *Thompson vs. Harlan*, 190.
14. Proper mode, in chancery, of setting up a bar by former decision, is by answer. *Givens vs. Peake*, 226.
15. A chancellor having made an order, in a suit between parties contending

## PRACTICE IN CHANCERY.

for a ferry, appointing a curator, and directing him to lease the ferry: it is competent for the court, to protect the lessee, and restrain *any party to the suit* from annoying him with actions involving any question embraced by the chancery suit.—And this may be done, by a new bill, with injunction; but more appropriately, by order in the former suit.—*McCauley vs. Givens*, 263.

16. Statutes of limitation are rules of decision in chancery. *Fenwick vs. Macey's Executors*, 278.
17. If the grantee is entitled to damages for a breach of warranty, or of a covenant of seizin, and the grantor *insolvent*, the grantee may obtain an injunction to restrain the collection of any unpaid portion of the purchase money, and finally have it set off against the damages. *Hawkins &c. vs. Simpson &c.* 305, 318.
18. If land be sold, by executed conveyance, and the title of the vendor fails, the vendee may file his bill *quia timet*, bring the parties before the court from whom he apprehends danger, to assert or relinquish their rights, and have the whole controversy settled by the decree. And, if the vendor is insolvent, the collection of the purchase money may be suspended, in the mean time, by injunction. Without those parties—which it is the duty of the complainant to bring before the court—there can be no relief. *Simpson &c. vs. Hawkins &c.* 309, 312.
19. The power of the chancellor to protect a party from apprehended loss (on a bill *quia timet*) should never be so used as to oppress, or injure, another party.—Per Judge Underwood. *Simpson &c. vs. Hawkins &c.* 311.
20. Upon a bill *quia timet*, if a party from whose title danger is apprehended, be a nonresident, to whom—he having failed to appear—the right to open the decree at any time within seven years, is reserved, the vendor may be required to give security to indemnify the vendee against loss, or he may be restrained from collecting the purchase money till the expiration of the seven years. *Simpson &c. vs. Hawkins &c.* 312.
21. A similar course may be pursued where the titles of infants are feared. *Ibid*, 313.
22. The pendency of a prior suit in chancery, between the same parties, for the same cause, may be pleaded in chancery. The pendency of a prior suit at law cannot be pleaded in chancery; but the plaintiff may be compelled to elect which he will proceed with. *Curd &c. vs. Lewis*, 352.
23. The pendency of a prior suit must be presented, by plea, or motion to dismiss, as a preliminary question. As an incident, among other matters, in an answer on the merits, it will not avail.—When this defence is duly made and established, the chancellor will dismiss the bill; or, if the prior suit be in his court, and *defective*, he may order a dismissal of that, and permit the complainant to proceed on his new bill.—Consent to a hearing, waives the defence of a former suit pending. *Curd &c. vs. Lewis*, 353.
24. There should be no decree against an infant without answer by guardian *ad litem*. *Johnson &c. vs. Johnson's heirs &c.* 369.
25. Defendants to a cross bill (other than the complainants in the original bill,) must be summoned, notwithstanding they may have appeared in the cause, in some other attitude. *Johnson &c. vs. Johnson's heirs &c.* 369.
26. Allegation of an answer, that the transfer of land warrants was by verbal agreement, anterior to the assignment endorsed, must be supported by proof, or the date of the assignment must be taken as the true date of the transfer. *Taylor vs. Knox's Executors*, 394.
27. Cause to be referred to a commissioner to state accounts and take testimony. *Taylor vs. Knox's Executors*, 400.

## PRACTICE IN CHANCERY.

28. Circuit courts have a great discretion in regulating the intermediate steps of a suit, which, unless for obvious abuse, the Court of Appeals will not curtail or control. *Todd &c. vs. Wheeler &c.* 402.
29. Where there has been an unusual delay in presenting a preparatory motion, and it appears the mover has lain by, to catch an undue advantage, he should not be heard. *Todd &c. vs. Wheeler &c.* 402.
30. Agreements as to the preparation of causes, should be fairly observed, and should not be rescinded, by the court, where the opposing party will be prejudiced by having made the agreement unless it is adhered to. *Todd &c. vs. Wheeler &c.* 403.
31. Great latitude is allowed, both in chancery and at law, in making amendments, and correcting errors; and while the matter remains under the control of the court, it is not to be tolerated that a party shall lose his property, by the cunning and adroitness of parties or lawyers, on the one hand, or their mistakes or inadvertencies, on the other. *Todd &c. vs. Wheeler &c.* 403.
32. Where a defendant has agreed to waive a matter of defence, and the court sets aside and annuls the agreement, there should be no final decree at the same term: time should be allowed for preparation upon the issue which had been waived and is reinstated. *Todd &c. vs. Wheeler &c.* 406.
33. There can be no decree, but what is based on allegations of the bill.—*Price &c. vs. Boyd &c.* 436.
34. Affidavit of a free man of color, to an answer in chancery. See *Practice in suits at Law*, 21, or *Commonwealth vs. Oldham*, 467.
35. The testimony of one witness prevails against the denial of an answer, sworn to only by a defendant who has no personal knowledge of the facts. *Combs vs. Boswell &c.* 474.
36. Failure to exhibit a note in a record in chancery—its existence not being denied, nor any assignment alleged, will not preclude the relief founded upon it. *Combs vs. Boswell &c.* 476.
37. The chancellor will not presume, against the denial of the answer put in, or adopted, by children, that an estate conveyed to them by their father, was intended as an advancement. *Doyle &c. vs. Sleeper &c.* 541.
38. The chancellor, in decreeing the sale of real estate, should follow the law, and (unless there is a special cause for selling the whole) sell so much only as will satisfy the decree. *Doyle &c. vs. Sleeper &c.* 542.
39. If a former decree is relied upon as a bar, it must be duly pleaded; prayer, in an answer, that the *pleadings and proofs*, in a former suit, may be made a part of this cause, does not present the decree. *Galloway vs. Hamilton's heirs &c.* 576.
40. The denial of an answer must prevail against a single deposition without corroborating circumstances. *Bibb vs. Smith &c.* 581.
41. The estimate which the parties put upon a commodity given and received in payment, or in barter, must, in general, be taken by the chancellor, as the actual value. *Wickliffe vs. Clay*, 590.
42. Dismission for want of security for costs. See *Costs*, 15.  
See *Limitations*, 7, 14.—*Mortgages*, 12.—*Equity*, 4, 7, 8.—*Lien*, 7.—*Parties to Suits in Chancery*, 14.—*Jurisdiction*, 22.

## PRACTICE IN SUITS AT LAW.

1. The court must decide upon the competency of title papers, and the right to use them, and, incidentally, under what title the party entered. *Carrico et al. vs. McGee*, 6.
2. An affidavit of surprise held insufficient. *Norton et al. vs. Sanders &c.* 19.
3. Warranty of the grantor of a plaintiff in ejectment does not authorize him to insert a count upon the demise of his grantor. The latter may

## PRACTICE IN SUITS AT LAW.

- have such a count stricken out upon motion. *Ross vs. Garrison and wife*, 85.
4. The same person cannot be both plaintiff and defendant. *Allin, Executor &c. vs. Shadburne's Representatives*, 72, 80.
  5. A question whether a note was given for a loan, or merely as a payment of a similar note already due—is one of fact, to be decided by a jury. *Letcher vs. Bank of the Commonwealth*, 85.
  6. Error, to render judgment by default, while a negative plea, casting the *onus* upon the plaintiff, remained in the cause, not answered. *White vs. Brown's Administrator*, 104.
  7. A party is not bound to state *what* he is about to prove by a witness whom he offers. And if a competent witness is offered, it is error to reject him, and ground for reversal, although it do not appear whether his testimony would have been material, or not. *Force vs. Smith*, 151.
  8. Due diligence, in using the proper means to recover a debt from the obligor, before resorting to the assignor, or endorser, is a question of law. *Johnson vs. Lewis*, 183.
  9. If two cases are pending for the same forcible entry, an election may be directed. *Boucher vs. Williamson*, 227.
  10. In a traverse of the finding in forcible entry and detainer, no advantage can be taken of irregularities in the proceedings upon the warrant, in the country. *Boucher vs. Williamson*, 227.
  11. Whether property alleged to belong to a defendant in an execution, was liable to a levy or not, is a question for the jury, and an instruction that assumes the liability, is erroneous. *Thome vs. Haley*, 269.
  12. A deposition being admitted, when objected to, no notice or cross examination appearing in the record, is error. *Thome vs. Haley*, 269.
  13. That there was no visible alteration of the actual possession of slaves and personalty, transferred, by deed, from one to another in the same family, is not, *per se*, evidence of fraud: but a fact which may be submitted to the jury, whose province it is to decide the question, upon all the proof. *Wash et al. vs. Medley*, 269.
  14. If notice of a motion be given, but not entered in court on the appearance day specified in the notice, it is null, and there can be nothing done upon it. *Miller vs. Boyd*, 272.
  15. If the motion is entered on the day specified in the notice, it becomes a cause in court, and stands continued (no order necessary) from day to day, or from term to term, until disposed of. *Miller vs. Boyd*, 272.
  16. Motions entered and continued, should be docketed with the other causes, and stand for trial in their turns. *Miller vs. Boyd*, 272.
  17. Instructions of the court, which assume, or presuppose, a fact proper for the decision of the jury, should not be given. *Lightburn vs. Cooper*, 273.
  18. The declaration, in dower, containing nothing to entitle the demandant to damages, to take a writ of enquiry was irregular; but the verdict being for the dower only, not for any damages, may be disregarded, and the judgment, on the default, might be sustained. *Taylor vs. Brodrick*, 347.
  19. The creditor is remitted to his judgment upon a quashal of a sale under execution. *Wilson vs. Percival*, 419.
  20. To swear the jury to try the *issue*, when there is no plea in, is error. *Clagget vs. Force*, 429.
  21. The oath or affidavit of a free man of color, *party*, may be received in any case where the oath or affidavit of a party is required or admissible. *Commonwealth vs. Oldham*, 467.
  22. Dismission for want of security for costs. See *Costs*, 15.
  23. On the trial of an issue upon a plea of want of consideration—the ques-

## PRACTICE IN SUITS AT LAW.

- tion must be submitted to the jury for their decision upon the facts, and their inferences from the facts: and instructions which assume that the covenant sued on was founded on a supposed liability, in the absence of proof that such was the sole consideration, are erroneous. *Fry vs. Rees*, 519.
24. Where, by the pleadings, the defendant holds the affirmative, not relying on any negative plea as a bar to the action—if he offer any proof whatever in support of the defence pleaded, the right to open and conclude the argument, appertains to him. But if no such proof is offered, the right belongs to the plaintiff. *Davies vs. Arbuckle*, 525.
  25. The affidavit of a party (uncontradicted) that a juror was related to his adversary, is sufficient evidence of that fact, upon a motion for a new trial. *Dailey vs. Gaines*, 529.
  26. Affinity is cause of principal challenge to a juror—the uncle, by marriage, of a party is not competent. *Dailey vs. Gaines*, 529.
  27. Whether the thing sold as an invention was so, or not, is a proper question for a jury. *Marshall vs. Peck et al.* 616.
- See *Joinder*, 1.—*Practice in Chancery*, 28, 31.—*Forcible Entry and Detainer*, 4, 5.

## PRESUMPTIONS.

1. Authority to execute a bond presumed. (See *Practice in Chancery*, 7.) *Talbot vs. Seabee's heirs*, 56.
2. That obligor and obligee are the same person, is not a legal deduction from the identity of the names. *Allin, Executor &c. vs. Shadburne's Representatives*, 69.
3. Every person capable, in law, of contracting, is presumed to understand the legal effect of his contract. *Allin, Executor &c. vs. Shadburne's Representatives*, 72.
4. That the master of a steam boat is authorized to make contracts to carry freight, is a presumption arising from the nature of his employment. *Bell et al. vs. Wood*, 147.
5. A payment to the holder of an obligation, may be presumed—when it does not appear at what time or on what consideration it was made—to have been made on account of the obligation. *Butler vs. Triplett*, 154.
6. A high price justifies the inference that the purchaser, ignorant of any defect of title, relied on the seller's representations—*Per Judge Nicholas, in a Dissent. Simpson &c. vs. Hawkins &c.* 315.
7. A grant may be presumed when an entry, survey, and thirty years possession, are shewn—*Per Chief Justice Robertson. Simpson &c. vs. Hawkins &c.* 326.
8. The grantee is presumed to understand the circumstances of the title, so far as they are indicated by recitals in the deed he receives: hence, the presumption that he was to risk the title, and rely on his warranty—*Per Chief Justice Robertson. Simpson &c. vs. Hawkins &c.* 327. Judge Nicholas' Opinion on this point, 317.
9. Where land was sold in pursuance of a power given by will, but by a conveyance defective and void, the heirs of the testator having long acquiesced, and probably received the proceeds, the presumption is, that they will never set up any claim—that they could do so successfully, is not certain—*per Chief Justice Robertson. Simpson &c. vs. Hawkins &c.* 327. Judge Nicholas' Opinion on this point, 322.
10. Grants, which, according to the books, may be presumed after twenty years possession, are grants of *incorporeal* hereditaments. If a grant of a fee simple estate can ever be presumed, it cannot be, upon a possession of less than thirty years. *Million vs. Riley et al.* 362.
11. A note made before the act raising such writings to the dignity of those

## PRESUMPTIONS.

- that are sealed, presumed to be a simple contract. *Craig vs. Whips*, 375.
12. Land warrants being transferred without reservation in the assignment, and no proof that a trust was intended—none can be presumed. *Taylor vs. Knox's Executors*, 393.
  13. That a party is informed of a sale of land made by his agent is a just inference; and it is to be presumed, that he knew, also, how the land was acquired. *Taylor vs. Knox's Executors*, 395.
  14. Land warrants being delivered to a locator, with an assignment to him of half the right—inference that he was to have that half for his services in locating &c. *Taylor vs. Knox's Executors*, 398.
  15. Presumption, or inference, by a jury.—See *Evidence*, 27, or *Grady vs. Leavel*, 427.
  16. Presumption of title from long possession and executory contract.—See *Conveyances*, 18, or *Woodson's Representatives vs. Scott*, 472.
  17. Where it appears that a tenant in possession entered under an executory contract, a jury may infer a legal conveyance from facts which do not amount to a legal presumption of a deed: but not from the single fact of nineteen years possession. *Craig vs. Austin et al.* 517.
  18. The consent of an executor in Virginia, that a slave should vest in the legatee, may be inferred from his removal, and bringing the slave with him, to this state. *Simrall's Administrator vs. Graham*, 574.
  19. Inference as to the consideration of a bond.—See *Equity*, 9, or *Bibb vs. Smith &c.* 582.
- See *clerks of courts*, 11.—*Fraud*, 14.

## PRINCIPAL AND SURETY.

See *Surety and Principal*.

## PRIVATE RIGHTS AND PUBLIC USES.

See *Constitution*, 1, 2.

## PROCESS, service of.

See *Service of Process*.—*Jurisdiction*, 18.

## PROVISIONS.

See *Sales*, 21.

## RECITAL

See *Estoppel*, 1.

## RECOGNISANCE.

1. A recognisance for an appearance to answer a charge of "gaming" (without describing the game, to shew that it was indictable,) will not support a judgment on a *scire facias*, for a failure to appear. *Commonwealth vs. West*, 165.
2. Variance between a *scire facias* and recognisance. See *Variance*, 1, 3, or *Commonwealth vs. West*, 165, and *Simpson vs. Commonwealth*, 523.
3. When a party appears according to his recognisance, and is discharged, it is thenceforth inoperative. No appeal or writ of error lies on the order discharging him. The remedy, where one bound to keep the peace is improperly discharged, is by a new proceeding before a justice. *Commonwealth vs. Oldham*, 468.
4. A *scire facias* on a recognisance for the appearance of a party in court, must shew that the recognisance was transmitted to the court. *Simpson vs. Commonwealth*, 523.
5. A recognisance that does not show that the party for whose appearance it is taken, is charged with felony, is defective and void. *Simpson vs. Commonwealth*, 523.
6. Upon the failure of the principal to appear, according to the condition of the recognisance, it is forfeited, as to him and the surety, and both are liable for the penalty. *Wilson vs. Wilson*, 98.



**RECORDING—REGISTRATION.**

See *Mortgage*, 11.

**RECORDS. OF COURTS.**

1. Papers put with those belonging to a cause, but not made exhibits by the pleadings, nor read upon the trial, are no part of the record. *Commonwealth vs. Chambers*, 12.
2. A marriage license, or bond, is no record. *Commonwealth vs. Rodas*, 599.
3. See *Justice of the Peace*, 2.

**REDEMPTION, of Land sold under Execution or Decree.**

See *Sales*, 4.

**RELEASE.**

1. Voluntary acts of an obligee, which suspend his right of action: as his marriage with the obligor, appointment of his debtor, who accepts the office, executor, &c.—do, in general, release the cause of action, to such debtors—and their co-obligors, also; for a release to one is a release to all. *Allin, Executor &c. vs. Shadburne's Representatives*, 69.
2. Mortgagor directs an execution against himself and the mortgagee, to be levied on the mortgaged land—this does not amount to a release of the mortgagor's interest. *Buck &c. vs. Sanders &c.* 188.
3. A release which is not accepted, has no effect. *Buck &c. vs. Sanders &c.* 189.
4. An agreement under seal, "to waive all exceptions to a decree as it now stands," is tantamount to a release of errors. *March vs. Talbot &c.* 443.

**RENTS AND PROFITS.**

1. A man and wife continuing to occupy the estate which her former husband devised to her during widowhood, then to his children, must account for the rents &c. from the time of her second marriage, and may charge the children for support &c. not exceeding the income of their estate. *Vance and wife vs. Campbell's heirs*, 231.
2. Vendee of land (by executory contract) after remaining many years in possession, recovers a judgment on a breach of the covenant for a title. The vendors then bring their bill, against the vendee, for the rents, profits &c. which the vendee resists, on the ground that there was a *paramount title* to the land, which *he had acquired*: held, that as the question of title was not decided (nor properly put in issue in this suit) a decree for the amount of rents and profits was erroneous. *Walker's Executors vs. Ogden*, 249. Judge Underwood dissents from this decision, 258.

See *Rescission of Contracts*, 17. *Heirs and devisees*, 3.

**RESCISSION OF CONTRACTS.**

1. Vendee of a chattel, upon discovering a defect which the vendor fraudulently concealed, may return, or tender it back, and rescind the contract; or may retain it, and recover damages. *Hoggins vs. Becraft &c.* 30.
2. To have a rescission of the sale of a chattel on account of a fraudulent concealment of unsoundness, there must be a return, or tender of the chattel to the vendor, *within a reasonable time*—what *that is*, must depend upon the circumstances of each particular case.—While the true nature of the unsoundness (as whether it be permanent or temporary) remains uncertain, it is not too late—provided the vendee acts in good faith, and no act of his has impaired the value in the mean time. *Hoggins vs. Becraft &c.* 30.
3. Vendee of land having agreed to bring suit to establish the title of his vendor, but failing, after diligent search, to find the lines or corners, or any title in his vendor, may rescind the contract, without any such suit. *Burshet &c. vs. Faulkner &c.* 100.

## RESCISSION OF CONTRACTS.

4. Mistake in writing a contract, is ground for a rescission. *Burchet &c. vs. Faulkner &c.* 100.
5. When a rescission of a contract of sale is decreed, restoration of the thing sold should be ordered. *Williams vs. Wilson*, 159.
6. One makes a bargain for the sale of land, receives part of the pay, and dies: his vendee transfers the bargain to a third party, and with the latter, the guardian of the decedent's children enters into a written agreement (of doubtful construction as to its obligation on himself, but,) stipulating that his wards shall make a title as soon as a balance of the consideration is paid—a bill for a rescission of the contract, which treats it as one binding the guardian himself to convey, alleging that *he* has no title, is erroneous and insufficient. It appearing, in such case, that the complainant might have a specific execution, he is not entitled to a rescission, of the contract. *Williams vs. Wilson*, 159.
7. Where the bill for rescission (in such case,) alleges that complainant paid a sum of money on account of the purchase—but does not say to whom, whether to the guardian, or to the decedent's vendee, and the defendant, though he admits that the complainant "was to stand in L's shoes," (i. e. in the place of the decedent's vendee,) yet denies that he (the guardian) ever received a cent, a decree against him for repayment of the money cannot be sustained. *Ibid*, 161.
8. The general rule is, that, upon a decree rescinding a contract of sale, the possession must be restored to the vendor.—But, if the rescission be the mere effect of a recovery at law, for a breach of the obligation to convey, the vendor will be left to his legal remedy, to regain the possession. The chancellor will not interfere, unless other circumstances give the jurisdiction, and also constitute a proper case for relief. *Walker's Executors vs. Ogden*, 251. Judge Underwood dissents in this case, 253—259.
9. Where a commodity was sold and *warranted*, and proves defective, when there was no fraud in the sale, nor right to return it reserved, a tender of it back, if refused, does not rescind the contract. The remedy is by suit on the warranty. *Lightburn vs. Cooper*, 273.
10. If there was *fraud* in the sale of a commodity, tendering it back, in due time, rescinds the contract. (See *Fraud*, 7.)—So also, where there was an agreement that it might be returned; or where the seller receives it when tendered. *Lightburn vs. Cooper*, 273.
11. False representations by the seller, relative to what the buyer might examine for himself, do not amount to a fraud, nor to a warranty. If the defects are such as could not be discovered, with ordinary care, false representations on those points, are fraudulent, and ground for rescission, by a return, or tender in due time. *Lightburn vs. Cooper*, 273.
12. A contract for the sale of land, unaffected by fraud, cannot be rescinded, in chancery, after it has been carried into effect by a conveyance. (See "*Set-off*," §.) *Simpson &c. vs. Hawkins &c.* 305, 308. Judge Nicholas dissents on this question. *Ibid*, 318, 321.
13. If the grantee in possession loses part of the land, he may recover, on the warranty, damages commensurate with the loss: but it is not cause for rescinding the whole contract. *Simpson &c. vs. Hawkins &c.* 305.
14. If land be sold, without fraud or misrepresentation, the conveyance executed, and the vendee in possession, and it afterwards turns out that the vendor was in fact destitute of title: yet while the vendee remains in undisturbed possession of the land, he cannot have a rescission for the failure of title. But, he may file his bill *quia timet*, bring the parties before the court from whom he apprehends danger, to assert or relinquish their rights, and have the whole controversy settled by the decree. *Simpson &c. vs. Hawkins &c.* 308, 328.

## RESCISSION OF CONTRACTS.

15. An agreement to waive a defence in a suit in chancery set aside.—See *Agreement*, 1.
16. When a vendee has made reasonable efforts to obtain the title, without success, has abandoned the possession, and filed his bill for rescission, it is too late to compel him to take the title, though ever so good. *Taylor vs. Porter*, 422.
17. The chancellor, in rescinding a contract, should place the parties as they were before the sale, or as nearly so as possible—possession to be restored; purchase money refunded.—So long as the parties abide by the contract, the vendee in possession is not chargeable with rents, nor entitled to interest on the money he has paid: *after disaffirmance* he is chargeable with rents, until he surrenders possession, and is entitled to interest until his money is refunded.—If his payment was partial only, there should be an equitable adjustment of rents and interest. *Taylor vs. Porter*, 423.
18. A vendee is not required to go out of the State, to notify a non-resident vendor, that he renounces the contract—he may abandon the possession without giving notice. *Taylor vs. Porter*, 424.
19. An estate to be restored, to the vendor, upon a rescission of a contract, on account of his failure to comply, and make the title—he must take in the condition in which it may be at the time of the restoration—without compensation for the casual destruction, decay or dilapidation of buildings and other improvements, not caused by any *culpable* act or omission of the vendee.—If he has sold and removed, or wantonly destroyed, or injured, the improvements, the vendor will be entitled to indemnity for the loss. *Taylor vs. Porter*, 424.
20. One bound to convey land may be exonerated, by an agreement to rescind, or by a decree and sale of the land to pay the consideration. But no such proceeding after he has notice of the assignment of his bond, will affect the assignee's rights. *McDonald vs. Ford*, 465.  
See *Covenant*, 12, 13.—*Equity*, 7.

## RESTITUTION.

1. Restitution upon the rescission of a contract. See *Rescission of Contracts*, 8.—*Jurisdiction*, 6.
2. Restitution of money paid upon an erroneous judgment. See *Jurisdiction*, 20.
3. Restitution of Stolen Goods. See *Stolen Property*.

## REVERSION AND REMAINDER.

1. If a gift, or sale, of a slave, or other chattel, be made upon condition, that if the purchaser die without issue, the chattel shall revert, or pass to a third party, the condition is void—and the entire property vests absolutely in the first donee. *Betty vs. Moore*, 236.
2. But—there may be a limitation of a remainder after a life estate, in personality; or it may be created, in effect, by executory devise, or conveyance in trust; though not by the ordinary modes of conveyance. *Id.* 237.

## REVIVOR, of Suits.

See *Abatement and Revivor*.

## RIGHT OF ENTRY.

See *Possession*, 25.

## ROADS.

1. The act incorporating the Maysville, Washington, Paris and Lexington Turnpike Company, provides a mode of indemnity for the owner through whose land the road may pass. And he may prevent the construction of the road on his land, until the damages are assessed and paid. *Blanchard vs. Maysville and Lexington Turnpike Company*, 87.

## ROADS.

2. The owner may stop the progress of the work upon his land, at any time before it is completed. *Ibid.*, 89.
3. The right of the owner to indemnity for having his land appropriated to a public road, is founded on the law of nature, and the constitution—the statute gives the remedy. *Blanchard vs. Maysville and Lexington Turnpike Company*, 91.
4. The provisions of the act incorporating the Lexington and Ohio Rail Road Company, which authorize the company to appropriate the land of individuals to the use of the road, the damages being first paid, are not unconstitutional. *O'Hara vs. Lexington and Ohio Rail Road Company*, 232.
5. Prosecutions for obstructing roads, are limited to six months—(See *Pleas and Pleading*, 28.) *Commonwealth vs. Washington*, 446.  
See *Corporations*, 4.

## SALE BONDS.

See *Sales*, 12.

## SALES.

- i. Sales of Land, 1, 3, 4, 5, 6, 10, 11, 12, 14, 15, 16.
- ii. Sales of Slaves, 8, 9, 17.
- iii. Sales of Chattels and Commodities, 1, 2, 7, 13, 18, 19, 20, 21, 22, 23.
1. A power of attorney authorizing the agent to sell, vests no title in him. *Beatty vs. Judy &c.* 102.
2. Purchaser of a chattel, from one in possession, who had no title, nor authority to sell, is responsible for the value, to the true owner. *Pool vs. Adkisson et al.* 115.
3. If the commissioner, appointed by a chancellor, to sell land, is directed by the order, to sell so much as may be necessary to pay the amount decreed, and he sells the whole, for more than is necessary for that purpose, the act is void. The sale and sale bond will be quashed, and a resale ordered. *Blakey vs. Abert*, 185.
4. The acts of assembly now in force (since 24th Jan. 1827,) requiring that land on which executions are levied, shall be appraised before the sale, with a view to its being redeemed, do not apply to sales by commissioners under decrees and orders of courts of chancery. Such sales are to be made without valuation, or right of redemption. *Blakey vs. Abert*, 185.
5. The interest of a mortgagee is not subject to a levy and sale under execution: neither where he is sole defendant, nor where the attempt is to levy on and sell the entire estate, under execution against mortgagor and mortgagee. *Buck &c. vs. Sanders &c.* 188.
6. A defendant directed an execution against himself and his sureties, to be levied on an estate that he had mortgaged to them, for their indemnity;—which, without the consent or knowledge of the mortgagees, was done, and a sale made of *all the interests*, or the fee simple entire: held that this did not amount to a waiver or release (of which there was no acceptance,) of the mortgagor's equity of redemption, so as to invest the mortgagees, or purchaser at the sale, with the whole title; and the sale, being of the fee simple, was *invalid*. *Buck &c. vs. Sanders &c.* 188.
7. Alleged want of title &c. in a defendant in an execution, by the purchaser at sheriff's sale. See *Practice in Chancery*, 13, or *Thompson vs. Harlan*, 190.
8. Sales on condition of a reversion upon a contingency. See *Reversion and Remainder*, 1, or *Betty vs. Moor*, 236.
9. Contracts of sale, intended originally only as securities, are to be treated as mortgages. *Fenwick vs. Macey's Executors*, 277.

## SALES.

10. The sale of an estate under a decree in chancery does not affect the right of one (not party to the suit,) who held a title paramount to that of him whose title was sold under the decree. *Simpson &c. vs. Hawkins &c.* 313, 330. Suggestions of Judge Nicholas on this point, 323.
11. Sale of land by the owner, while there was an execution against him in the hands of the sheriff. See *Execution*, 6, or *Million vs. Riley et al.* 360.
12. A sheriff's sale being set aside, the *sale bond* becomes invalid, and must, on motion, be quashed. The sale and sale bond quashed, the creditor is remitted to his judgment, unaffected by the levy. *Wilson vs. Percival*, 419.
13. Sale of a chattel, out of the state, by a defendant in an execution. See *Execution*, 10, or *Clagget vs. Force*, 428.
14. The chancellor, in decreeing the sale of real estate, should follow the law, and (unless there is a special cause for selling the whole) sell so much only as will satisfy the decree. *Doyle &c. vs. Sleeper &c.* 542.
15. Sales of land in the adverse possession of a stranger to the contract, are *void*, and no right of action arises to either party, from such a contract. Act of 1824, section 1. *Wash vs. McBrayer*, 565.
16. A deed, or bill of sale, to a purchaser, *pendente lite*, is not void, but voidable. *Cromwell vs. Clay*, 578.
17. One who buys a slave, while a suit is pending to subject it to the vendor's debts, takes the title dependent upon the event of the suit. If the suit fails, the title stands good. If it succeeds, the purchaser's title fails: but he may claim the surplus for which the slave sells above the amount of the decree. *Cromwell vs. Clay*, 578.
18. The purchaser of a chattel, *pendente lite*, might recover it from his vendor, if withheld by him. But not from an officer who holds possession under an order of court. *Cromwell vs. Clay*, 578.
19. The valuation which the parties put upon a commodity given and received in payment, or in barter, must, in general, be taken, by the chancellor, as the actual value. *Wickliffe vs. Clay*, 590.
20. False representations by the seller, as to the value of a commodity, or as to any matter that the buyer can ascertain by ordinary vigilance or enquiry, do not subject the seller to any legal liability. *Marshall vs. Peck et al.* 611.
21. In the sales of commodities, there is, in general, no implied warranty of soundness, quality or value. Sales of provisions, medicines, and sales by sample, are exceptions to this rule. *Marshall vs. Peck et al.* 612.
22. There is an implied warranty in all sales, that what is sold exists—susceptible of being transferred; that the seller (if in possession) has a good title; that a negotiable note sold, is genuine. If there is a failure in either of these points, the consideration paid may be recovered back, by action of assumpsit. *Marshall vs. Peck et al.* 612.
23. An invention is a fair subject of sale. And if what has been sold, in good faith, as such, is in fact an invention, its utility being matter of opinion—contingent, speculative, the transfer of the right to it, is a sufficient consideration to uphold the contract for the price, however useless and worthless the invention may prove to be. *Marshall vs. Peck et al.* 615.

## SCIRE FACIAS.

1. A recognisance for an appearance to answer a charge of 'gaming,' simply; *scire facias* describing it as a recognisance to answer an indictment for 'gaming by setting up and keeping a faro bank upon which money was bet and won and lost,' the variance is material. *Com. vs. West*, 165.
2. A *scire facias* on a recognisance for the appearance of a party in court, must shew that the recognisance was transmitted to the court. *Simpson vs. Commonwealth*, 523.

See *Variance*, 1, 3.

**SECURITIES.**

See *Surety and Principal*.

**SECURITY TO KEEP THE PEACE.**

See *Negroes*, 5.—*Recognisance*, 3.

**SECURITY FOR COSTS.**

See *Costs*, 15.—*Practice in Chancery*, 11.

**SERVICE OF PROCESS.**

1. A decree is void where there has been *no* service of process. Where there was service on some of the defendants, not on others, the decree is not void as to the former, but inoperative as to the latter.—*Wickliffe vs. Dorsey*, 462.
2. A traversor who appeared on the trial in the country, cannot quash the inquisition for, or take any advantage of, the want of proper service of the warrant. *Philips vs. Harman et al.* 468.
3. Under the common law, 'a man's house is his castle,' and an officer cannot legally break in, to execute a *ca. sa.* or *fi. fa.* upon the tenant, or his goods; but he may do it where the process requires him to take possession of any particular thing—as to execute a writ of seizin, *habere facias*, replevin, *capias ullagatum*, &c. *Keith vs. Johnson et al.* 605.
4. So also, if one man conceals another's goods in his house, the sheriff may break in to levy on them. *Ibid*, 606.
5. To execute a process upon a judgment in detinue, the sheriff could not, at common law, *make a forcible entry* into the defendant's *dwelling house*. But now, under our execution law of 1828, he may. *Keith vs. Johnson et al.* 606.

**SET-OFF.**

1. Use of a lot, and interest on the price, held to balance each other, upon a rescission of a contract of sale. *Talbot vs. Sebree's heirs &c.* 56.
2. Use of, and injuries to, land, recovered, to be set-off against improvements and ameliorations. *Haskins &c. vs. Spiller*, 176-7.
3. If the grantee is entitled to damages for a breach of warranty, or of a covenant of seizin, and the grantor *insolvent*, the grantee may obtain an injunction to restrain the collection of any unpaid portion of the purchase money, and finally have it set-off against the damages. *Simpson &c. vs. Hawkins &c.* 305, 309, 318, 321.
4. If one pays a debt against which he has a set-off, chancery has no jurisdiction of the case. *Adams vs. Dunlap*, 534.
5. The use of land, and the interest on the consideration paid for it, are, in general, to be considered equivalent, and to be set off against each other. But, as the evictor may recover for *mesne profits* for five years, the party evicted is entitled to interest, for the same term, on the consideration recovered back, from his vendor. *Wickliffe vs. Clay*, 594.

**SEVERANCE.**

See *Writ of Error*, 1.

**SHERIFF.**

1. A *sheriff* who levies on, and sells, property represented, and believed (without any suspicion to the contrary) by him, to be property of the defendant in the execution, but which turns out to be the property of a stranger, is liable to the stranger for its value. *Pool vs. Adkisson et al.* 116.
2. Sheriffs' liability for the fee bills of clerks. See *Fee Bills*, 1, 2, or *Fowler vs. Commonwealth, for Taylor*, 358.
3. A sheriff having collected money upon an execution, is bound to pay it over to the creditor, without a demand, if he resides in the county.—*Canterberry vs. Commonwealth, for Smith &c.* 416.
4. The attorney who recovered the judgment, may receive the money, and the sheriff will be justified in paying it to him. *Ibid*, 416.

**SHERIFF.**

5. If the creditor reside not in the county, the sheriff (though he *may* pay it to the attorney) is not bound to pay it to any one who does not produce an authority *in writing* from the creditor, for receiving it. *Ib.* 416.  
See *Bank Note Contracts and Liabilities*, 2.—*Service of Process*, 3, 4, 5.

**SHIPPING.**

1. The owner of freight must be deemed the consignee, where none is named (the blank not filled up,) in the bill of lading. *Bell et al. vs. Wood*, 148.
2. *Quere*—whether, when goods are shipped in a vessel of a better class (steamboat,) ‘with the privilege,’ (as expressed in the bill of lading,) ‘of reshipping on any smaller, good boat, in case the river shall be too low,’ they may be transferred to a vessel (keel boat) of an inferior class—two judges divided in opinion. *Bell et al. vs. Wood*, 148. But—
3. If the boat to which the goods are transferred, be propelled in a manner different from that for which she was calculated, and by which the danger and risque is increased, the owners of the boat in which the shipment was first made, are responsible for the loss, or damage, of the goods. *Bell et al. vs. Wood*, 149. And—
4. The master of a steam boat is authorized to make contracts of affreightment. *Bell et al. vs. Wood*, 147.
5. The contracts of the master (within the scope of his authority,) bind the owner. *Ibid.* 147.  
See *Action*, 6, 7.

**SIMILITER.**

See *Pleas and Pleading*, 10.

**SLANDER.**

1. A declaration in slander charging words as having been spoken in the third person, is sufficiently sustained by proof of words spoken in the second person. *Dailey vs. Gaines*, 529.

**SLAVES.**

1. Widow is not entitled to dower in the slaves of the husband, emancipated by his last will and testament. *Lee vs. Lee's Executor &c.* 48.
2. The phrase—“personal estate”—in wills and contracts, includes slaves, *Beatty vs. Judy &c.* 102.
3. Advancements *in slaves* are not to be brought into hotchpot in the distribution of *personally*, nor *vice versa*. *Stone's Reps. vs. Halley*, 198.
4. The mortgages in possession of slaves, is liable, to the mortgagor, for hire ;—an allowance for raising the young ones, to be deducted from the hire. (See *Limitations*, 12.) *Fenwick vs. Macey's Ex'ors*, 286.
5. Slaves do not pass by nuncupative will. *McCans &c. vs. Board's heirs*, 340.
6. Hence, the widow who fails to renounce the bequests of a nuncupative will, is, nevertheless, entitled to be endowed of the slaves. *Ib.* 340.
7. Sales, with a privilege of a repurchase reserved, and mortgages, of slaves. See *Mortgages*, 14, 15, 16, 17, 18, or *Fenwick vs. Macey's Ex'ors*, 276.
8. Gift of a slave to revert upon a contingency. See *Reversion and Remainder*, or *Betty vs. Moore*, 256.

See *Delinue*, 2.—*Dower*, 2.—*Sales*.

**SPECIFIC EXECUTION.**

See *Agent*, 11.

**STATUTE OF FRAUDS AND PERJURIES.**

1. A contract in writing for the sale of land, which contains no description or reference identifying the land, could not be enforced consistently with the statute against frauds and perjuries. *Hanly &c. vs. Blackford*, 2.

## STATUTE OF FRAUDS AND PERJURIES.

2. A description "adjoining him on the north" in a bond for a title, to land of the *vendor* adjoining land of the *vendee*, is an identification of the land, sufficiently definite to take the case out of the statute of frauds and perjuries. *Healy &c. vs. Blackford*, 4.
3. If a father holds the title to real estate, and, *being much indebted*, conveys it to his child, the conveyance will be (*by the statute*) fraudulent and void as to *all* his creditors. If he is not indebted at the time of the conveyance, it may be good against subsequent creditors. *Doyle &c. vs. Sleeper &c.* 532.
4. The purchase, by a debtor, with his money, of property which is conveyed to a third party, is not within the statute against fraudulent conveyances. *Doyle &c. vs. Sleeper &c.* 533.

## STEAM BOATS.

See *Contracts*, 10, 11, 12.—*Action*, 6, 7.—*Shipping*, 3.

## STOLEN PROPERTY.

1. Upon the conviction of a thief or robber, the owner is entitled to restoration of the thing stolen, or *its produce*: the thief, or robber, and his assigns, have no claim to it, and can maintain no action to recover it. *Lance vs. Cowan*, 195.
2. The right owner of stolen property may have restitution from a *bona fide* purchaser. *Lance vs. Cowan*, 196.

## SURETY AND PRINCIPAL.

1. A mortgage to *one* of several sureties, avails the others nothing. *Cooper &c. vs. Martin &c.* 28.
2. Taking a new note, with new obligors, and giving indulgence, without the consent of the surety, exonerates him:—*Bank vs. Letcher*, as reported in 3 J. J. Marshall, 197, *corrected*. *Letcher vs. Bank of Commonwealth*, 82.
3. In a bill upon a lost note, signed by principal and surety, the principal, if living, is a necessary party, and, if he is dead, his representatives must be parties. *Long vs. Dupuy*, 104.
4. Sureties indemnified by mortgage, cannot delay the creditor, while they subject the mortgaged property. *Buck &c. vs. Sanders &c.* 189.
5. The slaves of a defendant in an execution, who was a surety for the debt, were levied on, sold, and purchased by his father-in-law; who, dying, devised to his daughter, for life, *the slaves he had given her possession of*; under this devise, the defendant received the same slaves that had been sold under the execution: held that he thereby acquired a new and different title, not a restoration of what had been taken from him by the levy, so as to exonerate a co-surety (who was bound to contribute) from his liability to reimburse the owner of the slaves for half the amount they sold for. *Caldwell vs. Roberts*, 356.
6. If one of several sureties is compelled to pay the debt, or any part of it, the co-sureties are *immediately* liable to him, for their due proportions. He is not bound to pursue the principal, before he has recourse to them. *Caldwell vs. Roberts*, 357.
7. The act (of 1827,) authorizing judgments for the nominal amount in bank notes, against officers who have collected such money, and failed to pay it over, does not apply to their sureties; the recovery in a suit where they are included, can be only for the value of the paper when it ought to have been paid, and interest on it. *Canterberry vs. Commonwealth*, for *Smith &c.* 418.
8. Chancery has jurisdiction of the demand that accrues to a surety upon his paying the principal's debt. (See *Choses in Action*, 2.) *Moore &c. vs. Young*, 516.

See *Guardian and Ward*, 2, 3, 6.—*Covenant*, 12.—*Bastardy*, 2.



**SURPLUS, in Surveys of Land.**

See *Surveying*, 2.—*Conveyances*, 13.

**SURPRISE.**

See *Practice in Suits at Law*, 2.

**SURVEYING—SURVEYOR.**

1. Surveys cannot be made with precise accuracy, in the usual modes: five per cent. is a customary allowance for variations. *Eubank vs. Hampton*, 343.
2. Where a party was bound to convey a specified quantity of land—a tract described by its boundaries; which, upon a survey made by order of court, was found to exceed that specified quantity, a fraction more than five per cent.: held that this small variation would not justify the vendor in withholding the supposed surplus in making the conveyance. *Eubank vs. Hampton*, 343.

See *Fraud*, 5.

**SURVIVORSHIP, of a Right of Action.**

See *Action*, 9.

**TENANTS IN COMMON.**

1. The interest of a *feme covert*, tenant in common, passes, upon her death, to the husband, if she had a child which could inherit. *Daniel vs. Bratton et als.* 209.
2. Lessee of tenants in common, suing for the whole tract, may recover for as much as he shews title in, and demises by, any of the co-tenants.—But a judgment for more—for the whole, when there are co-tenants on whose title there is no demise, is erroneous. *Daniel vs. Bratton et als.* 210.
3. The possession of one tenant in common is deemed the possession of all—nothing appearing to the contrary. *Moss et al. vs. Currie et al.* 267.
4. A tenant in common cannot recover in ejectment upon a joint demise.—*Gaines et al. vs. Buford*, 483.

**TENDER.**

See *Mortgage*, 1.

**TITLES TO LAND.**

See *Land Titles*.

**TRESPASS.**

See *Possession*, 1.—*Action*, 5.—*Service of Process*, 3, 4, 5.

**TROVER.**

See *Action*, 5.

**TRUST ESTATE.**

See *Fraud*, 13.—*Parent and Child*, 5.

**TURNPIKE ROADS.**

See *Corporation*, 1 to 5 inclusive.

**USE AND OCCUPATION.**

1. Use of a lot, and interest on the price, held to balance each other, upon a rescission of a contract of sale. *Talbot vs. Sebree's heirs &c.* 56.
2. The use of land, and the interest on the consideration paid for it, are, in general, to be considered equivalent, and to be set off against each other.—But, as the evictor may recover for *mesne profits* for five years, the party evicted is entitled to interest, for the same term, on the consideration recovered back, from his vendor. *Wickliffe vs. Clay*, 594.

See *Division of Land*, 2.

**UNCONSTITUTIONAL ACTS OF ASSEMBLY.**

See *Constitution*.

## VALUATION.

1. The acts of assembly now in force (since 24th January, 1827,) requiring that land on which executions are levied, shall be appraised before the sale, with a view to their redemption, do not apply to sales by commissioners under decrees and orders of courts of chancery.—Such sales are to be made without valuation, or right of redemption. *Blakey vs. Abert*, 185.
2. Where land is levied on as the property of a defendant, against whom *the possession* is held adversely, the *valuation* must be of *the land*, (not merely of the defendant's claim,) without deduction for the adverse possession. *Frizzle et al. vs. Veach*, 216.
3. The valuation which *the parties* put upon a commodity given and received in payment, or in barter, must, in general, be taken, *by the chancellor*, as the actual value. *Wickliffe vs. Clay*, 590.

## VARIANCE.

1. A recognisance for an appearance to answer a charge of "gaming," simply; *scire facias* describing it as a recognisance to answer an "indictment for gaming by setting up and keeping a faro bank upon which money was bet and won and lost;" the variance is material. *Commonwealth vs. West*, 165.
2. A deed, with covenant of warranty, by an executor, will not support a declaration drawn as upon his own covenant. *Maniffee vs. Morrison's Executor*, 209.
3. If a *scire facias* recites that the defendant was recognised to appear and answer a charge of felony, when the recognisance specifies no charge, the variance is fatal, and cannot be cured by reference to a record completed before the recognisance was taken. *Simpson vs. Com'lh*, 523.
4. A declaration on a traverse bond, against two defendants, avers that the traverse was not prosecuted with effect; the record produced in evidence, shews the inquisition found true as to one, untrue as to the other: it does not support the declaration, and the variance is fatal. *Cuin et al. vs. Flynn*, 144.

## VENDOR AND VENDEE.

1. There may be cases, where the vendee of land (though a *quasi tenant*) may protect himself, in chancery, under a superior title acquired from a stranger, against the claims of the vendor under whom he entered.—*Walker's Executors vs. Ogden*, 250.
2. If the vendee of land loses it, he may recover of his vendor, the nominal amount of the consideration, although it was paid in property at an exorbitant price. *Taylor vs. Knox's Executors*, 396.
3. Neither a stranger, nor a vendor's administrator, can take the place of a vendor, and require a vendee to pay purchase money, and take the title, which the vendor is unable to make. The vendor, or his legal representatives, as such, can alone make such title as the vendee will be compelled to accept. *Taylor vs. Porter*, 422.
4. The purchaser of a chattel, *pendente lite*, might recover it from *his vendor* if withheld by him.—But not from an officer who holds possession under an order of court. (See Sales, 16, 17.) *Cromwell vs. Clay*, 579.
5. Where a vendor of land cannot make the title, he must submit to a rescission, and return of the consideration. *Wickliffe vs. Clay*, 590. See *Equity*, 9.—*Improvements on Land*, 1, 2.

## VERDICT.

See *Evidence*, 27, 29.—*Instructions*, 9.

## VOID AND VOIDABLE.

See *Sales*, 16, 17.

**WARRANTY—of Chattels and Commodities.**

1. The warranty of any thing sold, *as to quality* (as that a clock is a good time piece) is no warranty of *its value*.—If there was no fraud, or concealment, the sale and delivery of the commodity (however worthless) is sufficient to uphold an obligation for the price. *Lightburn vs. Cooper*, 273.
2. Where a commodity was sold and *warranted*, and proves defective, when there was no fraud in the sale, nor right to return it reserved, a tender of it back, if refused, does not rescind the contract. The remedy is by suit on the warranty. *Lightburn vs. Cooper*, 273.
3. In the sales of commodities, there is, in general no implied warranty of soundness, quality or value.—Sales of provisions, medicines, and sales by sample, are exceptions to this rule. *Marshall vs. Peck et al.* 612.
4. There is an implied warranty in all sales, that what is sold exists—susceptible of being transferred; that the seller (if in possession) has a good title; that a negotiable note sold, is *genuine*. If there is a failure in either of these points, the consideration paid may be recovered back by action of assumption. *Marshall vs. Peck et al.* 612.

**WARRANTY—of Titles to Land.**

1. The warranty of the ancestor—lineal, collateral, or commencing by *disseizin*—binds the heir (in Kentucky,) to the extent of the value of the lands to him descended: no further. *Logan vs. Moore*, 58.
  2. Parcener is not bound by the warranty of his ancestor, beyond the value of his own share. *Logan vs. Moore*, 59.
  3. A covenant of warranty, in a deed made by a *commissioner*, in pursuance of a decree, binds the (constituent) grantor, and his heirs, as effectually as his own proper deed. *Logan vs. Moore*, 60.
  4. The action of the heir will be barred for so much of the land held under the warranty of his ancestor, as is equal in value to that which he took by descent—and no further. *Logan vs. Moore*, 58.
  5. If the grantee in possession loses part of the land, he may recover, on the warranty, damages commensurate with the loss: but it is not cause for rescinding the whole contract. *Simpson &c. vs. Hawkins &c.* 305, 328.
  6. A covenant of warranty is not broken until there is an *eviction*. *Simpson &c. vs. Hawkins &c.* 306.
- See *Vendor and Vendee*, 2.

**WIDOW.**

1. The whole estate being devised to the wife, during widowhood, she cannot be allowed for the support of the children while she so held the estate. *Vance and wife vs. Campbell's heirs*, 231.
2. Property of a decedent which (by act of November, 1821,) is exempt from execution, passes to the widow and heirs, if any; and is not assets to be administered. *Griffith et al. vs. Commonwealth*, 271.
3. The widow who fails to renounce the bequests of a nuncupative will, is nevertheless, entitled to be endowed of the slaves. *McCans and wife vs. Board's heirs*, 340.
4. A widow retained the whole real estate and slaves, and provided for the children—the income and expenses to be set off against each other.—For their support after she is endowed, and their part surrendered, she will be entitled to a compensation. *McCans et ux. vs. Board's heirs*, 342.

**WILLS.**

1. The phrase—"personal estate"—in wills and contracts, includes slaves. *Beatty vs. Judy &c.* 102.
2. One only, of three subscribing witnesses, being produced, to prove the execution of a will, he should be credible, and his testimony direct and positive: his "impressions," and statements "according to the best of his recollection," are not sufficient. *Carrico vs. Neal &c.* 163.

## WILLS.

5. Proof of testator's capacity contradictory and unsatisfactory, and it appearing that, if the will was signed by him, it was done in haste, and without the knowledge of any but the subscribing witnesses;—had character of the writer of the will, witnessed only by himself, his wife, and young son;—that the same writer had written, and the same witnesses attested a former will, when the testator was, confessedly, not of disposing mind—are circumstances against the authenticity of the will.—*Carrico vs. Neal &c.* 163.
  4. An inference, in favor of the validity of a will, drawn from the fact, that many of its provisions are like those of a former will, executed by the testator when undoubtedly of disposing mind, is more than rebutted by the fact, that the pretended last will, bears a still closer resemblance to a paper purporting to be a will, signed by the testator when he was clearly not of disposing mind. *Carrico vs. Neal &c.* 164.
  5. After-born children, claiming under the ancestor's will. See *Devises and Descents*, 5, 6, or *Haskins &c. vs. Spiller*, 171, 174, and *Woodard vs. Spiller*, 181.
  6. A testatrix, in making a bequest to her son, used language showing her expectation, and reason for the bequest, to be, that an advancement made by her husband, to the son, would be brought into hotchpot: held that he could not claim the legacy and retain the advancement too. *Stone's Representatives vs. Halley*, 199.
  7. A devisee cannot claim and hold, under a title adverse to that of the testator, any thing devised to him, and at the same time, take a devise or legacy under the will. He must acquiesce in the testator's right to the disputed property, and surrender it to the devisee to whom it is given, or forego the benefit of any devise or legacy to himself. *Gore vs. Stevens &c.* 203.
  8. The heir of a devisee, or legatee, who was dead when the will was made, or died before the testator, does not take the property so given—it is a lapsed legacy, or devise. *Gore vs. Stevens &c.* 205.
  9. Real estate does not pass by nuncupative will.—Nor do slaves, now, since the act of 1900, directing that they shall pass by will as land.—Hence, the widow who fails to renounce the bequests of a nuncupative will, is nevertheless, entitled to be endowed of the slaves. *McCans and wife vs. Board's heirs*, 340.
- See *Dower*, 4. *Devises and Descents*.

## WITNESS.

1. Witness stating that he is interested for some of those constituting the party by which he is offered, is not competent. *Norton et al. vs. Sanders et als.* 18.
2. If a witness says he is interested for some of the defendants, (in ejectment,) those who wish to avail themselves of his testimony, must shew that their defence is unconnected with that of their co-defendants, and the witness not interested with them. *Norton et al. vs. Sanders et als.* 18.
3. A party is not bound to state what he is about to prove by a witness whom he offers. And if a competent witness is offered, it is error to reject him, and ground for reversal, although it does not appear whether his testimony would have been material, or not. *Foree vs. Smith*, 151.
4. Where only one of the subscribing witnesses to a will is produced, he should be credible. *Carrico vs. Neal &c.* 163.
5. The witness to a will (which he had written) being of bad character, is a circumstance against its authenticity. *Carrico vs. Neal &c.* 163.
6. A witness not interested in the particular suit on trial, is not rendered incompetent by having an interest like that of the party by whom he is offered. *Woodard et al. vs. Spiller*, 181.

## WITNESS.

7. The fact, that an agent had exceeded his authority in selling and conveying land, and thereby incurred a liability, does not render him incompetent, as a witness, in a suit for the land, by persons who do not derive their title from his principal, as his liability would be the same whatever the event of the suit. If the motive for enforcing the liability would be lessened by a verdict for the party calling him, it might affect his credibility. In a suit (for the land) between his constituent, and those claiming under his deed, he would be incompetent. *Swearingen vs. Fields et al.* 338.
8. A co-obligor, who is not sued, or as to whom the suit is abated, is a competent witness, unless it be shown that he is interested in the event of the pending trial. If he can use the record in a separate suit against himself, (to show payment of the debt or the like) or if he will be responsible over for the whole or any part of the judgment, he is not competent—without a release from the party to whom he is, or will be, liable. *Long vs. Ray*, 430.

See *Negroes*, 5.

## WRIT OF ERROR.

1. In a writ of error, all those against whom the decree or judgment is rendered must unite, but if any are unwilling to incur the risque of costs and damages, they may have a severance, and be exonerated from that liability. (See *Appeal*, 4.) *Johnson &c. vs. Johnson's heirs &c.* 366.
2. A cross bill against the complainant only, comes up by appeal or writ of error to a decree on the original bill. *Stansberry vs. Simmons*, 415.
3. Where the inferior court had no jurisdiction, the court of appeals has none, and the writ of error in such case must be quashed. *Haney vs. Sharp*, 442.
4. No appeal or writ of error lies upon an order discharging a party who appears according to his recognisance to keep the peace. *Commonwealth vs. Oldham*, 468.

See *Office and Officer*, 1, 2.

## WRIT OF RIGHT.

1. That the defendant in a writ of right is not tenant of the freehold, is matter of abatement only. *Sanders' heirs vs. Buskirk*, 411.
2. Defendant in a writ of right may show that the demandant has been divested of his title, and so has no right to recover. *Sanders' heirs vs. Buskirk*, 411. But—
3. The demandant may show, that the sale and deed purporting to divest him of title, was collusive, fraudulent and void. *Ib.* 411.

*Ex R. J. C.*

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